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Message from the Outgoing Chair

End of Term Report

Virginia C. Robbins
Outgoing Chair

I have been struck this past year by not only the willingness, but the enthusiasm, with which so many of you have assisted the Section in getting things done. Thank you for that work, your strong leadership and your warm collegiality. What an honor and a pleasure it has been to serve as the Section's Chair! It seems appropriate at this time to provide a summary of recent accomplishments and some suggestions for the next steps.

Brownfield Cleanup Program. In the Fall, the Department of Environmental Conservation requested comments on a proposed revision to site eligibility that was contained in the Department's draft Brownfield

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A Message from the Incoming Chair

Miriam E. Villani
Incoming Chair

It is customary for the first message from an incoming Environmental Law Section chair to look at the past, and to the future. A good practice, it seems to me, should not be changed just for the sake of change, so I will take this opportunity to follow that tradition in my first message to you as chair of our Section.

My involvement with the Environmental Law Section and with *The New York Environmental Lawyer* began more than two decades ago, when I edited the "Recent Decisions" column while at St. John's University School of Law. I am honored to now be able to serve as the chair of this Section.

Environmental law has been my career, and my passion, as I know it is with many of our members. Indeed,

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Inside

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A Message from the Outgoing Chair
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Cleanup Program Guide. Under the able leadership of **David Freeman** and **Larry Schnapf**, co-chairs of the **Hazardous Waste/Site Remediation Committee**, comments on the revision were drafted, reviewed by the Executive Committee and submitted in mid-November. There were many concerns about the proposed revision, including that it would require the Department to make various judgments relating to economic development issues that were better left to those having that expertise. In late November, **David Freeman**, **Larry Schnapf** and I met with the Department's **Dale Desnoyers** and **Anthony Quartararo** to discuss the proposed revision. The revised Guide was issued in March 2005; the Department made modifications to the site eligibility section that were responsive to some of the issues we had raised.

Soil Vapor Intrusion. The Department and the Department of Health (DOH) have recently proposed guidance documents regarding soil vapor intrusion. The Section submitted comments on the Department's draft guidance on March 7, but more discussion with the Department on this program is warranted and planned. I have asked David Freeman and Larry Schnapf to solicit comments on the DOH's proposed guidance from the Executive Committee, the Hazardous Waste/Site Remediation Committee and the Toxic Tort Committee. The soil vapor intrusion programs are broad in scope and have the potential to reopen a multitude of remediated sites.

Legislation. On behalf of the Section, **Joan Leary Matthews** drafted a memorandum that was submitted to State legislators in support of a bill introduced by Assemblyman Adam Bradley to remove barriers to the courts for plaintiffs in controversies arising under the State Environmental Quality Review Act. Joan is working with the Bar Association's lobbyist, Ron Kennedy, to reach out to members of the Legislature to discuss the bill and encourage its passage.

Pro Bono Assistance. Antonia Bryson, **Phil Dixon** and **Alan Knauf** tracked the actions of the House of Delegates in revising the definition of pro bono assistance. In response to the suggestion of our Section that legal work to assist those who could not reasonably afford environmental counsel be considered to qualify as pro bono assistance, the definition was revised to include work that promotes or protects the "public interest." This work would, however, be in addition to the aspirational goal for each attorney of 20 hours of work annually on behalf of the indigent.

I am aware of two instances recently where our members have worked on environmental pro bono matters. **Joan Leary Matthews** and others in her community presented a proposal to the Bethlehem Central School District to reduce school bus idling. (DEC regulations permit idling up to five minutes; NYC limits idling to three minutes.) The District adopted a written policy in January; Port Washington has recently adopted a similar policy. These actions have improved the air quality for hundreds of students and bus drivers. If you are interested in proposing this program in your community, please contact Joan for details.

I was recently contacted by **Anne Hohenstein** of the Spill Fund; she asked me for a referral to an attorney who might be willing to represent an elderly, indigent woman with a spill matter. I contacted **Alan Knauf** and he graciously accepted the work.

These are just two recent examples of the contributions of our members to the public good; our Section could function as a clearinghouse for future opportunities.

Minority Environmental Law Fellowship Program. In January, **Peter Casper** and **Eileen Millett** assembled a committee comprised of members from the Section and the Environmental Law Committee of the Association of the Bar of the City of New York and they selected four minority fellows: **Amy J. Choi**—Washington University School of Law; **Harven V. DeShield**—SUNY at Buffalo School of Law; **Vanessa Facio-Lince**—Benjamin N. Cardozo School of Law; and **Sharonda C. Williams**—University of Pittsburgh School of Law. Each fellow was awarded a stipend of $6,000 funded in part by the Bar Foundation and in part by the Section for summer positions in the public and not-for-profit sectors. **John Greenthal** indicated at our January Executive Committee meeting that he would explore whether in the future we could find placements for minority fellows in the private sector.

The newly appointed Co-Chairs who will serve with Peter Casper on the Environmental Justice Committee are **Jean McCarroll** and **Luis Martinez**.

Internet Coordinating Committee. Alan Knauf and **Bob McLaughlin** have been working with staff at the Bar Association to improve the Section's web site. (http://www.nysba.org/environmental) They began by testing whether the links that were on the site actually worked; they identified information that should be on the web site, but was not; and they added current data to the "new developments" section. Alan and Bob continue to work to improve the web site. If you have recommendations, please contact them.

On May 3, 2005 the Section co-sponsored with the Association of the Bar of the City of New York a panel

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From the Editor

The Section recently enjoyed both a very successful meeting in conjunction with the New York State Bar Association's Annual Meeting in New York City, and the Legislative Forum and Government Attorneys Luncheon in April. Attendance at both was excellent and, as usual, mixed social and professional activities. I hope to include in the next issue of the *Journal* the Comments of our speakers at the Legislative Forum. The outgoing Commissioner of DEC, Erin Crotty, made her valedictory presentation at the Annual Meeting, and the incoming DEC Commissioner, Denise Sheehan, greeted us at the Spring Luncheon. Of course, these were formalities: both Commissioners have known, and have worked with, many Section members for years, which enhanced the personal comfort level between the Section and the agency with which we have perhaps our closest relationship. Commissioner Crotty's remarks are included in this issue. Commissioner Sheehan's remarks will be included in the Summer issue.

With this issue, Ginny Robbins submits her final column as Section Chair. Ginny has been so active in so many different capacities, that her presence seems almost permanent. It seems hard to believe that her tenure as Chair has passed so quickly. Section activities were numerous, sophisticated and hopefully influential, as has been the case for so many years. The Brownfields cleanup program has been a particularly active realm of endeavor, yet Section members have also focused on many more issues that do not often appear so clearly on our readership's radar screen. Ginny's column provides an overview of some of these issues, which demonstrate the Section's ongoing commitment to high caliber volunteer professionalism. As Committees start to provide updates in the *Journal*, readers will have yet more reason to appreciate the Section's broad sway, the opportunities for members to take on interesting and important projects, and the benefits of greater participation. Miriam Villani, whose diligence and enthusiasm for Section projects and administration is also well established, is the new Chair.

Walter Mugdan submits an article on EPA's "All Appropriate Inquiries" rule in relation to the Brownfield exemptions to CERCLA. Walter is a Section officer as well as one of EPA's senior statesmen—if he'll forgive the characterization. By virtue of his long experience with EPA as well as his invariably well informed suggestions and insights, any of Walter's articles warrant a close read. This one is no exception, though the author clearly notes that the opinions expressed therein are personal ones and not an expression of EPA policy.

Turning to the New York Brownfields realm, David Freeman and Larry Schnapf submit an article that analyzes DEC's Brownfield Cleanup Program's final site eligibility criteria. This has been an eventful topic of late. How site eligibility is defined, in the relevant legislation and by DEC, and the predictability with which criteria are applied, has significant consequences for attorneys who regularly practice in this subfield of environmental law and, especially, for their clients. Dave and Larry are Co-Chairs of the Section's Hazardous Waste/Site Remediation Committee. Both have been very actively involved, with other Committee members, in shaping the discussion on Brownfields issues, so that readers can count on an informed and hence invaluable analysis. The article was previously published in the *New York Law Journal*.

Richard Weber, of Bond Schoeneck & King, submits an article on the Court of Appeals' recent *Speonk Fuel* decision, its relationship with that Court's prior holding in *State of New York v. Green*, the scope of discharger liability under New York's Navigation Law, and some factual nuances of *Speonk* that, in the author's view, better support Judge George Bundy Smith's *Speonk* dissent. The author's argument should provide food for thought to Section members with clients who fall into some of the traps for the unwary described by these cases.

Jeff Zimring of Whiteman Osterman & Hanna LLP submitted the Administrative Update. James Denniston, as Student editor, again submitted case summaries prepared by students at St. John's Law School. St. John's Environmental Law Society, under Phil Weinberg's guidance, (and for which incoming Chair Miriam Villani once served as Student editor) traditionally submits the case summaries for the *Journal*. The Society also hosts an annual event which honors attorneys in the Environmental field. Peter Lehner was recently honored. Walter Mugdan was another recent honoree.

As many Section members know, Phil Weinberg and Bill Fahey are actively involved in several matters relating to transportation in and around metropolitan regions, especially that of New York City, as they pertain to public policy as well as to environmental policies. Phil and Bill recently hosted a significantly well attended conference at the Association of the Bar of the City of New York that generally addressed freight

delivery into New York City, daily commuting, networking the several transportation lines into and around New York City, and how to bring better coherence to a transportation web that for historical as well as fiscal reasons often evades reasonable congruence. As one who attended, I can attest that the speakers were first rate, and well positioned to offer informed insights into the many connected policies that often leads to disconnected transportation links. Many of these speakers were especially persuasive that, in a world of unconventional security threats, the need to rethink transportation of not only people, but also supplies, into and out of the metropolitan area has acquired greater urgency. A brief synopsis of the discussion is included on page 7.

I would like to remind committees to please provide reports of their ongoing and prospective activities, for inclusion in future issues. I also invite committees to submit articles. This Section has active committees in all areas of the Section's range of interests. Our committees have often influenced the public debate on important environmental matters of concern and have typically been successful in guiding the legislative or regulatory process on troublesome issues. These committees are a repository of institutional knowledge and specialized information. Many of these committees have attorneys with sufficient standing to make informed contributions to environmental policy as it evolves. They are a natural place to which young, and even well experienced, attorneys, will gravitate. All the more reason for committees to advertise their many efforts to readers, Section members, and prospective Section members, many of whom, upon joining, may well bring more resources to committee endeavors.

Finally, I want to remind readers that the *Journal* is actively soliciting articles and other contributions for a special issue that will focus primarily on the Hudson River and its watershed region (see advertisement below).

Kevin Anthony Reilly

Request for Articles

Special Issue "Rivers and Harbors"

The *New York Environmental Lawyer* is actively seeking articles and other submissions in connection with a Special Issue, "Rivers and Harbors." This symposium issue will focus on the Hudson River and its tributaries, the Hudson River Valley, and the wider New York Harbor watershed.

The Hudson and other rivers that feed into New York Harbor have historically been the arteries that connected this strategically and commercially critical region throughout American history. If one wants to understand the regional environment, one must be knowledgeable about historic uses. If one wants to gauge the success of future uses, one must take into account environmental regulations and policies. With the inarguable benefits of modern environmental law, this riverine network and its maritime destination are enjoying an unsurpassed ecological recovery that deserves special attention.

The Hudson River Valley also, in particular, has occupied an unsurpassed but often too-little-appreciated niche in regional history. As suburbia sprawls north from New York City and south from the Capital Region, the unique and colorful character that has defined its culture for centuries is threatened with homogenization.

Hence, in further celebration of the 40 years since *Scenic Hudson* and the resurgent regional ecology, in recognition of the dramatic growth of "Gotham" history and the growing appreciation of the interconnectedness of the City, the river and the region, but also in an awareness of the fragility of the unique human cultural ecologies of the Hudson River Valley, the *New York Environmental Lawyer* invites the participation of authors who can deepen our environmental and historical awareness of the Hudson and its environs.

Environmental Law Section Annual Meeting Keynote Address

January 28, 2005

The Environmental Law Section was pleased to have Erin M. Crotty, the Commissioner of the New York State Department of Environmental Conservation, as its keynote speaker at the Section's Annual Meeting on January 28, 2005.

The Annual Meeting was one of Commissioner Crotty's last public appearances as commissioner prior to her retirement from that position on February 2, 2005. In her remarks, Commissioner Crotty reviewed the progress of the state's environmental programs during the tenure of Governor George Pataki and outlined future environmental opportunities and challenges.

As Commissioner Crotty stated, "Our philosophy has been that we cannot have a strong economy without a protected environment, and we cannot have a protected environment without a strong economy," noting that "[i]f you degrade environmental resources, you degrade the economy." She outlined numerous accomplishments and progressive initiatives of the current administration, including the acquisition of more than 900,000 acres for state preservation, protection of the New York City watershed, adoption of regulations to address acid rain, enactment of landmark brownfields legislation, reforming and refinancing the State Superfund program, creation of an environmental justice policy for the Department of Environmental Conservation, and improvements to the state's waterways including the Hudson River. In addition, Commissioner Crotty noted the efforts, spearheaded by the Governor, to seek a regional solution to air quality issues involving carbon dioxide and ozone.

Commissioner Crotty, however, cautioned that significant problems remain. Chief among those are the world-wide impacts arising from global warming. The Commissioner reviewed the magnitude of this problem and its effect on the environment. She also referenced other difficult matters such as the continuing extinction of plant and animal species, the impacts of acid rain on the state's forests, the threats posed by invasive species, and the health impacts (such as asthma) of environmental pollution.

Erin M. Crotty

The Commissioner indicated that these problems can be addressed if we as a society are willing to undertake the necessary efforts to do so. She emphasized that government is a great enabler of change and that through clear policies, leading by example, and providing appropriate incentives (or, in certain cases, disincentives), positive environmental achievements can be accomplished.

The Commissioner also took the opportunity of her presentation to thank the members of the Environmental Law Section for their contributions to, and support for, environmental programs and initiatives during her tenure at the Department of Environmental Conservation.

Following Commissioner Crotty's remarks, Section Chair Ginny Robbins presented the Commissioner with the Environmental Law Section Award for 2005. The award referenced Erin Crotty's commitment to the environment, her leadership of the Department of Environmental Conservation, her advocacy of landmark brownfields reform and air quality initiatives, and her promotion of public involvement in environmental decision making. On behalf of the Section, Ms. Robbins thanked the Commissioner for her advocacy and leadership on environmental issues.

Louis A. Alexander

Environmental Benefit Project Policy

As noticed in the May 11, 2005 issue of the *Environmental Notice Bulletin*, the New York State Department of Environmental Conservation is revising its policy on Environmental Benefit Projects.

As set forth in the draft revised policy, an environmental benefit project (EBP) is a project that a respondent agrees to fund in partial settlement of an enforcement action. The EBP must improve, restore, protect, and/or reduce risks to public health and/or the environment beyond that achieved by respondent's compliance with applicable laws and regulations. The Department has the authority to utilize an EBP as part of an overall settlement agreement with a respondent. As stated in the draft revised policy, "[a]ny EBP contained in a settlement agreement must be in addition to actions correcting the violation. The respondent may receive some penalty offset for conducting an EBP."

The EBP Policy was originally issued on August 3, 1995 and last revised on May 27, 1997. The current policy can be found at www.dec.state.ny.us/website/ogc/egm/ebp.html. Proposed revisions to the policy include modifying the nexus criteria that must be satisfied in order for the Department to approve an EBP, and removing the prohibition on public education projects being funded as EBPs. A link to the draft revised EBP policy can be found on the Department's website at www.dec.state.ny.us/website/ogc/egm/index.html.

The Department accepted public comment concerning the new proposed EBP Policy through June 11, 2005. Comments on the revised EBP Policy should be sent to Andrew Kreshik, Regional Enforcement Coordinator, Office of General Counsel, 625 Broadway, 14th Floor, Albany, NY, 12233-5500.

Louis A. Alexander

Transportation Committee Seminar

The Seminar sponsored by the Transportation Committee of the Environmental Law Section of the New York State Bar Association and the Transportation Committee of the Association of the Bar of the City of New York was held at the City Bar Building on May 3, 2005. Phil Weinberg acted as moderator.

The first speaker was William Wheeler, director of Planning of the Metropolitan Transportation Authority. He described in detail the MTA's mega projects, which include the Fulton Transportation Center in lower Manhattan, the new South Ferry subway terminal, the Second Avenue Subway, the East Side Access project which would bring the Long Island Rail Road into Grand Central Terminal, and the JFK-Lower Manhattan rail link.

The next speaker was Thomas Schulze, Director of the New Jersey Transit, Access to the Region's Core Project. This Project includes a new two-track rail tunnel under the Hudson between New Jersey and New York and a new terminal under 34th Street for the trains brought into New York by this tunnel. Tom explained the huge growth in Trans-Hudson commuting in the last twenty years and the fact that the present transportation facilities are at capacity. The Port Authority of New York and New Jersey is co-sponsor of this project.

John McHugh, filling in for Congressman Gerald Nadler, discussed the proposed rail freight tunnel which would connect Jersey City and Brooklyn. Mr. McHugh is a transportation lawyer and a member of the East of Hudson Rail Freight Task Force. He discussed the vulnerability to terrorist activity, air pollution, and traffic congestion, which is the result of the New York area's almost complete dependence on freight delivery by truck. The projected growth in freight movements in the next twenty years will make this situation intolerable, according to Mr. McHugh, unless something is done.

Jeff Zupan, Chief Planner for the Regional Plan Association, summed up the projects described by the speakers and the importance of each. His main theme was that if this Region does not build with an eye to the future, that future may be one of shrinking prospects and a deteriorating economy rather than the growth we are presently enjoying.

The final speaker was Richard Ravitch, the former Chairman of the MTA, who devised the financial plan which put the transit system back on track after the disinvestment of the 1960s and 1970s had brought it to the edge of disaster. His main theme was that political leadership was necessary to both prioritize these various projects as it would be almost impossible to build them all at once, and to take steps necessary to pay for them. He again echoed the sentiment that doing nothing could only lead to the weakening of this area economically.

This is the second program sponsored by the two Transportation Committees. Last year a presentation on the London scheme, whereby cars are required to pay a toll for entering Central London during peak periods, was presented by Stephen Pollen, the former Chief Counsel to the MTA and current advisor to Robert Kiley, the Director of Transport of London. Mr. Kiley himself is a former Chairman of the MTA.

Both of these programs were very well received and attended. It is hoped that they will become an annual feature of the Transportation Committee of the Section on Environmental Law.

William Fahey

EPA's "All Appropriate Inquiries" Rule and the Superfund Liability Exemptions Established by the Brownfields Law of 2002

By Walter E. Mugdan[1]

The Small Business Liability Relief and Brownfields Revitalization Act ("the Brownfields Law"),[2] included several significant amendments to CERCLA's liability scheme. It established an exemption from Superfund liability for two classes of owner/operator: contiguous property owners and bona fide prospective purchasers. The law also provided important further clarification with respect to a third class of owner/operator that had long been exempt from liability, the so-called "innocent landowners."

Under the Brownfields Law, there are a number of conditions that each of these three classes of owner/operator must satisfy in order to enjoy the exemption from Superfund liability. Many of these conditions are common to all three classes, and are the subject of interpretive guidance issued by EPA known as the "Common Elements Guidance." Among the most important of these common elements is the requirement that persons or entities hoping to enjoy one of these liability exemptions must have carried out "all appropriate inquiries" (AAI) into the environmental conditions of the property in question before acquisition thereof. In August 2004, EPA published its proposed AAI rule, which establishes standards for such inquiries.

Both the Common Elements Guidance and the proposed AAI rule are discussed further below. Before discussing them in detail, however, it is useful to review the liability exemptions applicable to these three categories of owner/operator.

Contiguous Property Owners

Section 221 of the Brownfields Law creates a new subsection 107(q) of CERCLA, which generally excludes from liability under CERCLA § 107(a) the owner of a property contiguous to one from which there is a hazardous substance release. (This is similar to and consistent with EPA's longstanding policy that owners of land above an aquifer contaminated by releases from another's property will not be pursued as potentially responsible parties (PRPs) for that contamination.[3]) As noted, the exemption from liability is encumbered by a number of conditions and limitations. Under the Brownfields Law, a person that owns land contaminated by a contiguous (or similarly situated) property is exempt from owner/operator liability, provided the person—

- did not cause, contribute or consent to the release or threatened release of hazardous substances;
- is not potentially liable or affiliated with any other person potentially liable for the release;
- takes reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit exposure from hazardous substances released on the person's own property;
- provides full cooperation, assistance, and access to persons authorized to undertake response actions and natural resource restoration;
- complies with all land use controls being relied on in connection with the response action and does not impede the performance of any institutional controls;
- complies with all information requests;
- provides all legally required notices with respect to the discovery or release of any hazardous substance at the facility; and
- conducted all appropriate inquiry at time of purchase, and did not know or have reason to know of the contamination.

The burden is on the landowner to prove, by a preponderance of the evidence, that these conditions are satisfied. If a person does not qualify for liability relief as a contiguous landowner because he knew or should have known of the contamination at the time of purchase, and therefore cannot satisfy the condition in the last bullet point above, the person may nevertheless qualify for the liability relief afforded under the Brownfields Law to bona fide prospective purchasers.

Bona Fide Prospective Purchasers

Section 222 of the Brownfields Law creates a new subsection 107(r) in CERCLA that exempts bona fide prospective purchasers of sites (and their tenants) from owner or operator liability under § 107(a), so long as the person does not impede the performance of a response action or natural resource restoration. The Brownfields Law also creates a new subsection 101(40) which defines a bona fide prospective purchaser (BFPP) as one who buys a property after the date of enactment

of the Brownfields Law (January 11, 2002) and establishes, by a preponderance of the evidence, each of the following conditions with respect to the property in question:

- all disposal at the property took place before the date of purchase;
- the person made all appropriate inquiries;
- the person provides all legally required notices with respect to the discovery or release of any hazardous substance at the facility;
- the person exercises appropriate care with respect to the hazardous substances at the property by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit exposure;
- the person provides full cooperation, assistance, and access to persons authorized to undertake response actions or natural resource restoration;
- the person complies with land use restrictions and does not impede any institutional controls;
- the person complies with all information requests; and
- the person is not otherwise potentially liable or affiliated with any other person who is potentially liable.

It is worth noting that a BFPP can lose that status if, at some time after acquiring property, she does not continue to take "appropriate care" with respect to hazardous substances at the property by taking "reasonable steps" to stop continuing releases or prevent threatened future releases; or she ceases to provide full cooperation, assistance and access to persons authorized to undertake response actions; and the like.

Windfall Liens

The Brownfields Law provides the United States with a lien (referred to as a "windfall lien") on property acquired by a BFPP if the U.S. has unrecovered response costs with respect to the property and the government's response action has increased the fair market value of the property. In valuing any windfall lien, EPA will generally seek only the increase in fair market value attributable to a response action that occurs *after* a bona fide prospective purchaser acquires the property at fair market value. EPA will typically calculate the increase in fair market value attributable to EPA's cleanup by considering the fair market value of the property as if cleanup were complete versus the fair market value of the property when acquired—presumably, the BFPP's purchase price.

Innocent Landowners and the Statutory Requirement for the "All Appropriate Inquiries" Rule

Section 223 of the Brownfields Law amends subsection 101(35) of CERCLA, the so-called "innocent landowner" provision (which has been included in the statute for many years). The most significant change here is that Congress sought to clarify what actions landowners must take to satisfy the "all appropriate inquiries" requirement of the existing defense.[4] Congress directed EPA to promulgate, within two years, regulations establishing standards and practices for satisfying the AAI requirement. The Brownfields Law includes a substantial list of considerations that EPA must include in such regulations, such as inquiries by environmental professionals; interviews with past owners and operators; reviews of historical records identifying past land uses and the like; reviews of government records; etc. Until EPA promulgates its final AAI regulations, the law specifies that one of two standards applies, depending on the date the property was purchased:

1. If the property was acquired prior to May 31, 1997, a court shall consider any specialized knowledge of the defendant; the relationship of the purchase price to the value that the property would have if it was not uncontaminated; commonly known or reasonably ascertainable information; obviousness of contamination; and the ability of the defendant to detect contamination by appropriate inspection (essentially the considerations in CERCLA prior to amendment by the Act; see previous footnote).
2. If the property was acquired after May 31, 1997, the applicable standard is the ASTM "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process."[5]

Congress added that for residential or similar property purchased by a private, non-commercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the "all appropriate inquiries" requirement for innocent landowner status.

To prepare the AAI rulemaking package called for by this provision of the law, EPA convened a "Negotiated Rulemaking Committee" comprised of 25 stakeholders representing federal, state, tribal and local governments, the real estate, banking and building industries, environmental groups, etc.[6] The product of that Committee's deliberations—a "Final Consensus Document"—was published in November 2003.[7] EPA's proposed AAI rule was published on August 26, 2004[8] and is discussed further below.

The "Common Elements" Guidance

As is apparent from the discussion above, several different provisions of the Brownfields Law establish similar threshold criteria in order for an entity to achieve and maintain an exemption from CERCLA liability. On March 6, 2003 EPA issued guidance about these "common elements."[9] As already outlined, each of the three categories of landowners—contiguous landowners, bona fide prospective purchasers, and innocent landowners—enjoy conditional CERCLA liability protection, provided they meet and continue to meet certain statutory criteria. For example:

- they must have carried out "all appropriate inquiries" before buying the property;
- they must continue to comply with applicable land use restrictions and institutional controls;
- they must take reasonable steps to stop continuing releases, prevent threatened future releases, and prevent or limit exposure to earlier releases;
- they must cooperate with persons authorized to carry out a cleanup or other response action;
- they must cooperate with government requests for information;
- and they must provide legally required notices related to the discovery or release of hazardous substances at the property.[10]

The Common Elements guidance addresses these shared statutory criteria, stating with specificity the view of EPA about what such landowners must do, or not do, to satisfy the criteria. Among the more important discussions in the guidance is that concerning what kinds of steps are "reasonable" for landowners to take in order to stop continuing releases, threatened future releases, and so on. The guidance explains that—

> EPA believes Congress intended to balance the desire to protect certain landowners [*i.e.*, BFPPs, CPOs (Contiguous Property Owners) and ILOs (Innocent Landowners)] from CERCLA liability with the need to ensure the protection of human health and the environment. In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did *not* intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater). [Footnote omitted.] . . . Nevertheless, it seems clear that Congress also did not intend to allow a landowner to ignore the potential dangers associated with hazardous substances on its property.[11] [Emphasis in original.]

The required reasonable steps relate only to responding to contamination for which the BFPP, CPO, or ILO is *not responsible*. Of course, activities on the property after purchase resulting in new contamination can give rise to full CERCLA liability.

The "All Appropriate Inquiries" Rule

The first of the "Common Elements" listed above is that the BFPP, CPO or ILO must have conducted "all appropriate inquiries" into the property prior to acquisition. As discussed earlier, Congress directed EPA to establish by regulation what constitutes AAI, and EPA published its proposed rule on August 26, 2004 following an extensive "negotiated rulemaking" process involving more than two dozen stakeholder representatives.

It is virtually certain that, once promulgated (and perhaps starting even prior to promulgation) the AAI rule will become the common standard in the real estate industry, not only for sites with potential Superfund liability but for all significant real estate transactions. It will presumably replace the familiar and widely used ASTM "Phase I" standard (E-1527) in this role, and thus the following discussion of the provisions of the proposed rule makes frequent comparisons with that standard.

Objectives

The objectives of the AAI rule are different in subtle but important ways from the ASTM Phase I standard. Under the latter, the goal of the inquiry was to determine whether there were "recognized environmental conditions" (which, if present, might warrant further evaluation through a Phase II investigation including environmental sampling). The AAI rule states that its purpose is "to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property."[12]

Look-back Period

The extent of the historical "look-back" period required under the ASTM Phase I standard and the proposed AAI rule is also different in a small but potentially significant way. Under Phase I, the inquiry was to extend back in time to the "property's obvious first developed use; or back to 1940, whichever is earlier." The AAI rule provides that relevant historical records to be reviewed "must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural,

commercial, industrial, or governmental purposes."[13] Arguably, this requires a further look-back than was called for by the ASTM Phase I standard. "Historical documents" include "aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records."[14]

In the look-back provision, as elsewhere in the AAI rule, EPA specifies that the "environmental professional" carrying out the inquiry may exercise professional discretion (in this case to determine how far back in time to search historical records). And it is with respect to the "environmental professional" that perhaps the most important and certainly the most controversial change has been wrought by the AAI rule.

Required Credentials

To meet the AAI standard, the inquiries must be carried out by an "environmental professional," a term of art defined in the proposed rule. The rule provides a menu of criteria that, if satisfied, qualify the investigator to be characterized as an environmental professional for these purposes. For example, the test is satisfied if the individual holds a current Professional Engineer's or Professional Geologist's license or registration *and* has three years of full-time relevant experience; *or* is licensed or certified (by the federal, or a state, tribal or U.S. territorial government) to perform environmental inquiries *and* has three years' experience; *or* has a bachelor's or higher degree from an accredited institution in a relevant discipline *and* five years' experience; and so forth. Continuing education in the field is also required. Persons who do not qualify may nevertheless assist in the conduct of inquiries, thus gaining relevant experience.[15]

Interviews

Under the proposed AAI rule, the assessment must include interviews with past and present owners, operators and occupants of the facility. These interviews may have to extend to facility managers and other employees, if necessary to fulfill the objectives of the rule. For abandoned properties, interviews with neighbors must be conducted if there is evidence of potential unauthorized uses of the property in question.[16]

Government Records

Records from all levels of government—federal, state, tribal and local—must be reviewed, and the rule provides considerable detail about the sorts of governmental records to consider.[17] Database search radii are set out in the proposed rule, but once again these can be modified based on the judgment of the environmental professional.[18] There is a specific requirement to search for the existence of environmental liens against the property that may have been filed under federal, state, tribal or local law.[19]

Inspections and Other Sources of Information

Visual inspections of the subject property and adjoining properties must be performed unless physically inaccessible (and even then, aerial photographs should be consulted).[20] The inquiry must take into account any relevant special knowledge by the affected individuals with respect to the property,[21] as well as any commonly known or reasonably ascertainable information within the local community.[22] Also to be considered is the relationship of the purchase price to the fair market value of the property if it were uncontaminated; a significant difference could suggest that the seller may have reason to suspect a hazardous substance release.[23]

Hazardous and Other Substances

Where the inquiry is being carried out Superfund grant funding, it is not to be limited to threatened or actual release of "hazardous substances" (a CERCLA term of art), but should extend as well to "pollutants and contaminants" (another CERCLA term of art that is more inclusive) and even "controlled substances" (*i.e.*, illegal drugs).[24]

Written Report and Certification

The results of the inquiry must be fully documented in a written report by the environmental professional. The report must include the professional's opinion as to whether the inquiry has "identified conditions indicative of releases and threatened releases of hazardous substances. . . ."[25] Importantly, the report must also identify data gaps, defined to mean ". . . a lack or inability to obtain information required by the standards and practices listed [in the proposed AAI rule] despite good faith efforts by the environmental professional . . . to gather such information. . . ."[26] A specified form of signed certification by the environmental professional must be included in the written report.[27]

Shelf Life

The proposed rule permits the use of an AAI report performed for another, but requires in any case that the information in the report not have been collected more than a year prior to the date of property acquisition (and even that is shortened to six months for certain categories of information such as interviews with past and present owners and operators, visual inspections, certifications, etc.).

Costs

EPA estimated the incremental increased cost of an environmental assessment in connection with a property transaction, resulting from adoption of the proposed AAI rule, as being very modest: an average of $41 to $47 for the vast majority—97%—of all transactions. In the remaining 3% of transactions the incremental costs

are estimated to be substantially higher, $1,448 to $1,454.[28]

EPA received a large number of comments from many different quarters concerning its proposed AAI rule. It would be surprising if some of the provisions did not change by the time the final rule is promulgated, perhaps in significant ways. Nevertheless, even in advance of promulgation, it is likely that the proposed rule will have an important influence on the way in which knowledgeable environmental professionals provide services to their clients.

Endnotes

1. Any opinions expressed in this article are those of the author, and do not necessarily reflect the position of the U.S. Environmental Protection Agency.
2. Pub. L. No. 107-118.
3. On January 13, 2004 EPA issued guidance on the application of the contiguous landowner liability exemption. *See* "Policy Toward Owners of Property Containing Contaminated Aquifers," May 24, 1995, at: http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/contamin-aqui-rpt.pdf. The guidance provides clarification on how EPA will interpret and apply this statutory provision. For instance, EPA will not restrict application of the liability exclusion to owners whose land is literally contiguous to the property from which there is a release; those who own land that is close, even if not adjacent, will be treated the same way. Although the statutory provision applies to current landowners, EPA will exercise its enforcement discretion to treat in the same manner former owners who meet the same tests. And while EPA will not routinely do so, the Agency may in certain circumstances be willing to provide a No Action Assurance letter to a contiguous property owner.
4. Under Section 107(b) of CERCLA, a person otherwise liable can make out an affirmative defense based, *inter alia*, on proof that the hazardous substance release in question was caused by a third party. The defense is, however, denied to one who has a contractual relationship, direct or indirect, with the third party who caused the release. Since a deed for property is a contract, subsequent landowners who discovered contamination caused by the previous owner might not be able to avail themselves of the defense. However, CERCLA § 101(35) provides that a landowner can escape liability under § 107(a) if she acquired the land after hazardous substances were placed there, *and* can show by a preponderance of the evidence that—
   i. she didn't know and had no reason to know of the release or the presence of hazardous substances; or
   ii. she acquired the land through escheat or other involuntary transfer, or through eminent domain or condemnation; or
   iii. she acquired land through inheritance or bequest.

   Additionally, CERCLA § 101(35) formerly went on to specify that *appropriate inquiries*, "consistent with good commercial or customary practice in an effort to minimize liability," must have been made at the time of acquisition of the property, including inquiry into previous ownership and uses. Furthermore, a court considering the matter is directed to take into account "any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property and the ability to detect such contamination by appropriate inspection." This provision has been replaced under the new Act, as discussed in the text above.
5. Standard E1527-97 of the American Society for Testing and Materials.
6. For a list of members of this Federal Advisory Committee, see http://www.epa.gov/brownfields/aai/faca.htm.
7. See http://www.epa.gov/brownfields/aai/draftreglangfinal.pdf.
8. 69 Fed. Reg. 52541, proposing a rule to be published at 40 C.F.R Part 312.
9. "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ('Common Elements')." This document is usually referred to simply as the "Common Elements" Guidance. *See* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf.
10. The last two of the items enumerated in the text above apply to bona fide prospective purchasers and continuous property owners, but not to innocent landowners. However, these landowners may have independent legal obligations to answer such information requests and/or provide such notices.
11. *Id.*, n. 22, at 9-10.
12. Proposed 40 C.F.R § 312.20(d), 69 Fed. Reg. 52577.
13. Proposed 40 C.F.R § 312.24(b), 69 Fed. Reg. 52579.
14. Proposed 40 C.F.R § 312.24(a), 69 Fed. Reg. 52579.
15. Proposed 40 C.F.R § 312.10(b), 69 Fed. Reg. 52576.
16. Proposed 40 C.F.R § 312.23, 69 Fed. Reg. 52578-52579.
17. Proposed 40 C.F.R § 312.26, 69 Fed. Reg. 52579.
18. Proposed 40 C.F.R §§ 312.26(c) and (d), 69 Fed. Reg. 52579.
19. Proposed 40 C.F.R § 312.25, 69 Fed. Reg. 52579.
20. Proposed 40 C.F.R § 312.27, 69 Fed. Reg. 52580.
21. Proposed 40 C.F.R § 312.28, 69 Fed. Reg. 52580.
22. Proposed 40 C.F.R § 312.30, 69 Fed. Reg. 52580.
23. Proposed 40 C.F.R § 312.29, 69 Fed. Reg. 52580.
24. Proposed 40 C.F.R § 312.1(c), 69 Fed. Reg. 52576.
25. Proposed 40 C.F.R § 312.21(c), 69 Fed. Reg. 52578.
26. Proposed 40 C.F.R § 312.10(b), 69 Fed. Reg. 52576.
27. Proposed 40 C.F.R § 312.21(d), 69 Fed. Reg. 52578.
28. 69 Fed. Reg. 52571.

Walter E. Mugdan is the Director of the Division of Environmental Planning & Protection, U.S. Environmental Protection Agency, Region 2.

Brownfield Cleanup Program's Final Site Eligibility Criteria

By David J. Freeman and Lawrence P. Schnapf

On March 9, 2005, the New York State Department of Environmental Conservation (NYSDEC) published final eligibility criteria (Eligibility Criteria) for its draft Brownfield Cleanup Program (BCP) Guide.[1] The final Eligibility Criteria will be incorporated into the draft BCP Guide as Section 2, entitled "Eligibility."

New York's Brownfield Cleanup Act of 2003 (the Act)[2] created perhaps the most generous tax credit program in the country for brownfield sites. Unlike other state brownfield programs, which generally limit the value of tax credits to the amount of cleanup costs, the Act includes in its tax credit base the costs of improvements, including the erection of buildings and other depreciable assets. Because the Act also contains a very broad definition of "brownfield," it soon became clear that certain projects, which might have proceeded in any event, could generate tax credits substantially disproportionate to the amount of cleanup costs incurred.

This phenomenon is particularly pronounced in New York City, where there are a large number of major developments taking place on sites which are only lightly to moderately contaminated. Indeed, over half of the BCP applications that NYSDEC received through 2004 were for New York City sites.[3] These sites have the potential to generate hundreds of millions of dollars in tax credits, probably far in excess of what the State legislature contemplated at the time of the Act's passage. NYSDEC apparently was asked to tighten the BCP eligibility criteria to stem the potential revenue loss to the State. Critics coined the draft Eligibility Criteria the "New York City Rule."

The final Eligibility Criteria are an improvement over the draft eligibility criteria proposed in October. We are encouraged that NYSDEC evaluated and took into consideration many of the concerns raised during the public comment period, including those expressed by the authors[4] and by the Environmental Law Section of the New York State Bar Association. Most importantly, NYSDEC ultimately decided not to base its eligibility determinations upon an expansion of the statute's six statutory "public interest" criteria, an approach which would have created serious legal and practical issues.

While the final Eligibility Criteria are an improvement over the draft, the final criteria will continue to have the effect of not only disqualifying many sites in New York City, but also in other cities such as Yonkers, Rochester and Buffalo. Compounding this problem is NYSDEC's elimination of the Voluntary Cleanup Program (VCP). Thus, site owners, developers and municipalities who are prevented from enrolling in the BCP under the new criteria may have no practical alternative for voluntarily remediating sites.

Revised Brownfield Definition

The statutory definition of "brownfield" is quite broad and refers to any real property whose redevelopment or reuse is complicated by the presence or potential presence of contamination. NYSDEC's final amendments to the BCP Guide interpret the statutory definition as requiring the presence of two elements: (1) confirmed contamination on the property or a reasonable basis to believe that contamination is likely to be present on the property; and (2) a reasonable basis to believe that contamination or potential presence of contamination may be complicating the development or reuse of the property. For each element, NYSDEC has identified a number of factors that it will take into consideration to determine whether a particular site satisfies these criteria.

In determining if there is confirmed contamination or a reasonable basis to believe that contamination is likely to be present on the property, NYSDEC will consider the following factors:

- The nature and extent of known or suspected contamination.
- Whether contaminants are present at levels that exceed standards, criteria or guidance.
- Whether contamination on the proposed site is historic fill material or exceeds background levels.
- Whether there are or were industrial or commercial operations at the proposed site which may have resulted in environmental contamination.
- Whether the proposed site has previously been subject to closure, a removal action, an interim or final remedial action, corrective action or any other cleanup activities performed by or under the oversight of the State or Federal government.

The third and fifth factors are perhaps the most troublesome for potential brownfield applicants. Many urban properties throughout the State have contaminated fill material that was placed onto the property and that has to be managed as a hazardous waste because it exhibits a hazardous characteristic for metals. Under

NYSDEC's current interpretation, unless a developer can show that the historic fill material was contaminated from an on-site source, the site will not be eligible for the BCP even though the developer will incur additional costs to dispose of the hazardous fill materials off-site.

NYSDEC will also review if the proposed site has previously been subject to closure, a removal, remedial or corrective action, or any other cleanup activity performed by or under government oversight. It is not clear why or how NYSDEC will apply this factor. Will NYSDEC determine that there is no reasonable basis to believe that contamination is likely to be present because it was previously remediated? If residual contamination remains at a site, only one contaminant was addressed (e.g., petroleum) or only a portion of a site was remediated, we do not see how this factor could be use to deny acceptance of a site into the BCP.

With respect to the second element, NYSDEC will consider the following criteria to determine whether there is a reasonable basis to believe that contamination or the potential presence of contamination may be complicating the development, use or re-use of the property:

- Whether the proposed site is idled, abandoned or underutilized.
- Whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination.
- Whether properties in the immediate vicinity of the proposed site show indicators of economic distress such a high commercial vacancy rates or depressed property values.
- Whether the estimated cost of any necessary remedial program is likely to be significant in comparison to the anticipated value of the proposed site as redeveloped or reused.

NYSDEC will use these criteria to evaluate each proposed site "on a case-by-case basis." NYSDEC has indicated that no single criterion will be sufficient to disqualify a site from the BCP, but it is not clear how the agency will weigh the individual factors.

Even if an applicant can surmount these two hurdles, the Eligibility Criteria provide that NYSDEC may redefine the "brownfield site" so that only a portion of a proposed site may be enrolled in the program. Thus, if the improvements are constructed on the portion of the property that NYSDEC determined was not covered by the program, the developer will not be able to claim BCP tax credits for the improvements even though they are part of the overall project. The allocation and tax accounting issues created by this approach will be formidable, particularly with respect to projects where improvements are located partially in and partially outside the pre-existing zone of contamination.

This narrow reading of a "brownfield site" will not only reduce the value of the tax credits generated by the project but could also limit the liability relief provided by the BCP. Because the covenant not to sue will be limited to the contamination addressed at the brownfield site, a developer will not receive any liability protection with respect to portions of the project not within the defined brownfield site.

NYSDEC also made some minor changes to the categories of sites that would be automatically ineligible for the BCP. In addition to the sites that are subject to an ongoing enforcement action pursuant to Environmental Conservation Law (ECL) Article 27, Title 7 (Solid Waste Management and Resource Recovery Facilities) or Title 9 (Industrial Hazardous Waste Management), the final BCP Eligibility Criteria exclude sites subject to an enforcement action *or a permit issued* pursuant to these sections of the ECL.

NYSDEC did adopt the proposed exception for petroleum sites that are subject to an order issued pursuant to either Article 12 of the Navigation Law (Oil Spill Prevention, Control and Compensation) or ECL Article 17, Title 10 (Control of the Bulk Storage of Petroleum). The BCP Guide now provides that sites subject to a stipulation agreement under either statutory provision are eligible if the proposed site would otherwise meet the eligibility criteria.

Potential Implications of the BCP Eligibility Criteria

Overall, NYSDEC's revisions to the Eligibility Criteria avoid the legal infirmities of the draft criteria by not being based expressly on an expansion of the "public interest" standard. However, they do not remedy the draft criteria's flaw of being inconsistent with the broad statutory definition of a brownfield site. For example, some of the site eligibility criteria concern issues that would be more appropriately addressed during the BCP work plan process, and not during the BCP enrollment process. Information relating to the extent and level of contamination often is not available during the application phase of the BCP process, and the statute does not contemplate an intrusive site investigation as a prerequisite to enrollment into the BCP. Applicants cannot be asked to prove a negative. Will NYSDEC reject sites if insufficient information to evaluate these factors is not available at the application stage or if it turns out later on that the site was not as contaminated as originally thought?

Additionally, some of the eligibility factors require NYSDEC to make economic and demographic judg-

ments for which the agency does not have the institutional expertise (e.g., whether a proposed site is "unattractive" for redevelopment or evaluating the economic vitality of the surrounding a proposed site). New York courts have in the past invalidated agency actions on this basis.[5] There is the further question, of course, as to whether NYSDEC can accomplish these changes via guidance rather than through formal rulemaking.[6]

Most significantly, the final eligibility amendments to the BCP Guide continue to have the vice of reintroducing unpredictability and uncertainty into the voluntary cleanup process, which the Act was designed to eliminate. Consistency and transparency in the decision-making process may succumb to ad-hoc determinations. Site owners and developers may be disinclined to commit substantial upfront time or money to prepare and pursue an application to the BCP if they are uncertain as to whether a particular site meets the definition of a brownfield.

As discussed in our earlier article, imposing restrictive eligibility criteria will also put owners of ineligible sites in a regulatory "no-man's land." By artificially tightening BCP eligibility and not creating another mechanism for voluntarily cleaning up sites, NYSDEC may force site owners to remediate properties without NYSDEC oversight or public involvement. Consequently, such sites may not be cleaned up to levels that adequately protect human health or the environment. Moreover, restricting eligibility for the BCP will leave developers and site owners who might otherwise need state signoff (e.g., closure letters and releases) on a cleanup for reasons other than tax credits (e.g., qualification for insurance reimbursement or a requirement of a lender) without any avenue to obtain regulatory approval for their cleanups.

Conclusion

As we have noted in the past, NYSDEC has in general done a conscientious and reasonable job of implementing the Act. However, the agency has unfortunately been placed in a position of artificially restricting BCP eligibility to minimize the extensive tax credits that could be generated by the program. We believe that not only is it unfair for NYSDEC to be put in this position, but that restricting site eligibility is also not an appropriate response to this problem.

The concern over tax credits that NYSDEC has attempted to fix with the revised Eligibility Criteria is intrinsically one that is within the purview of the State legislature, which can remedy the funding problem by statutorily modifying the formula for calculating the tax credits under the BCP. We urge the legislature to address this issue promptly so that the credibility and effectiveness of the BCP is not further damaged.

To the extent that NYSDEC has decided to take on this issue as its own, it has a special obligation to apply these criteria in a fair and consistent manner. The fate and long-term success of the BCP hang in the balance.

Endnotes

1. The draft BCP Guide was published on May 12, 2004 and was subject to public comments through July 12, 2004. A revised version of the guide incorporating such comments has yet to be published.
2. Chapter 1 of the Laws of 2003, and amended by Chapter 577 of the Laws of 2004.
3. According to recent testimony of the Director of the New York City Office of Environmental Coordination, 71 of the approximately 150 BCP applications were for New York City sites. Of the 71 sites, 39 were sites that had transitioned from the VCP and 32 applications were submitted under the BCP. NYSDEC has approved 6 of the applications, with the remaining 26 in administrative limbo waiting a decision, some for as long as nine months. Based on the final Eligibility Criteria, many of the remaining 26 BCP applications could be rejected by NYSDEC.
4. *See*, "Brownfield Cleanup Program's Draft Eligibility Criteria," Freeman, David J. and Schnapf, Lawrence P., The New York Law Journal, Nov. 16, 2004, p. 4.
5. *See, e.g., Boreali v. Axelrod*, 71 N.Y.2d 1, 523 N.Y.S.2d 464, 517 N.E.2d 1350 (1987).
6. *See, e.g., Cordero v. Corbisiero*, 80 N.Y.2d 771, 587 N.Y.S.2d 266, 599 N.E.2d 670 (1992).

State v. Speonk Fuel: The Untold Story Behind the Court of Appeals Decision

By Richard L. Weber

In October 2004, the New York State Court of Appeals issued its opinion in *State of New York v. Speonk Fuel, Inc.*[1] In *Speonk Fuel*, the Court sets forth a significant expansion of discharger liability under the Navigation Law.[2] The *Speonk Fuel* opinion proclaims that discharger liability may lie against an entity that purchases a petroleum storage system *after* the discharging activity ends and the discharging system is removed. However, the Court of Appeals fails to address the unique procedural background of the case. This article aims to address the history of *Speonk Fuel* and its potential impact on the precedential value of the decision.

Pre-*Speonk Fuel* Law of Discharger Liability in New York State

The provisions of the Oil Spill Act—contained within the New York State Navigation Law—govern discharger liability in New York State. Navigation Law § 172(8) defines the term "discharge":

> "Discharge" means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state.[3]

The Navigation Law mandates strict liability for damage from, and remediation of, a petroleum discharge. Under Section 181(1), "*any person who has discharged petroleum* shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained."[4] Unfortunately, the statute is silent as to who—or what—might constitute a "discharger" in any given circumstance. The legislature's omission in this regard has been widely documented by the state courts.[5]

Until recently, the Court of Appeals was reluctant to provide much guidance in this area. In 1995's *White v. Long*, the Court noted that lower courts had construed the statute as imposing discharger liability on the owner of the property at which the discharge occurred, regardless of fault.[6] Yet the Court declined to consider the issue at that time, noting that it was not properly before the Court on appeal.[7] The Court demurred again in 1999's *Art-Tex Petroleum v. Dept. of Audit and Control*, noting that it was "unnecessary" to consider in that case whether mere ownership itself was a sufficient basis for imposing liability.[8]

In the absence of a Court of Appeals directive on the matter, the task of developing a proper standard for discharger liability fell to the lower courts. Common themes emerged from the various lower court decisions. First and foremost, those who actually discharged petroleum would be subject to discharger liability.[9] Ownership of property on which the discharge occurred, with or without fault for the discharge, could also result in liability in certain courts.[10] Where the owner of the discharging system and the underlying real property were not the same, liability would be placed upon the owner of the discharging system.[11] The Third Department set forth perhaps the most expansive view of discharger liability in *State v. Montayne,* holding that an entity could be subject to discharger liability if it was in a position to halt a discharge, or effect an immediate cleanup, or prevent the discharge in the first place.[12]

In 2001, the Court of Appeals considered the scope of discharger liability in *State of New York v. Green*.[13] In *Green*, the Court considered whether a faultless landowner qualified as a "discharger" liable for cleanup costs. The discharge in question occurred at a trailer park when a tenant's above-ground kerosene storage tank fell, spilling kerosene onto the ground. The State intervened, removed the discharge, and subsequently commenced a lawsuit against the landowner to recover its remediation costs.[14] In its opinion, the Court of Appeals articulated a "control" test for determining discharger liability:

> As the statutory language indicates, a "discharge" includes "*any intentional or unintentional action or omission* resulting in" the spilling of petroleum. Nothing in the statutory language requires proof of fault or knowledge. To the contrary, the language is sufficiently broad to include landowners . . . who have both control over activities occurring on their property and reason to believe that their tenants will be using petroleum products. . . . [Defendant's] failure,

> unintentional or otherwise, to take any action in controlling the events that led to the spill which will effect an immediate cleanup renders it liable as a discharger. By predicating liability on a landowner's control over the contaminated premises, we insure that landowners are not in all instances liable for spills occurring on their property.[15]

In its opinion, the Court addressed concerns that faultless property owners could be exposed to liability from unaffiliated "midnight dumpers" or from "an errant oil truck that spills fuel" upon a property. In either situation, the Court asserted that the landowner "would not be liable as a 'discharger' because . . . the landowner cannot control the events resulting in the discharge."[16] Nevertheless, the Court rejected defendant's invitation to limit discharger liability only to those who actually caused or contributed to a discharge, on the theory that such limitation "would discourage landowners from promptly cleaning up their contaminated land, leaving the state to shoulder the entire cost of the cleanup while it searches for the party at fault."[17]

The *Green* control test was quickly adopted by the lower courts.[18] The acceptance of the control test provided a modicum of certainty in assigning discharger liability—at least until *Speonk Fuel*.

The Court of Appeals *Speonk Fuel* Opinion

The Court of Appeals opinion sets forth many (though by no means all) of the basic facts of the case. Defendant Local Wrench Service Station, Inc. immediately preceded Speonk Fuel ("Speonk") as the owner and operator of a gasoline service station and its associated underground petroleum storage system.[19] The underground storage system included five underground gasoline tanks. In October 1985, the underground storage system was tested for tightness. One of the five underground tanks—a 4,000-gallon unleaded gasoline tank—failed the tightness test.[20] As it happens, Speonk's president, Thomas Mendenhall, was present at the property during the tank tightness test.

Three months later, on January 8, 1986, Speonk contracted to purchase the service station and the storage system, and Mendenhall contracted to purchase the underlying real property.[21] Two weeks later, the defective tank was removed from the ground and discovered to have a one-eighth inch hole. A DEC representative observed the removal, and two days later advised Local Wrench to install groundwater monitoring wells. DEC warned Local Wrench that if it failed to investigate and remedy groundwater contamination attributable to the leak, DEC would perform the work through contractors and seek reimbursement pursuant to the Navigation Law.[22]

Local Wrench, Speonk and Mendenhall did not complete the sale of the service station, storage system and real property until March 12, 1986—roughly seven weeks *after* the defective tank was removed. On that date (according to the Court of Appeals opinion) Speonk acquired title to the service station and the storage system, and Mendenhall acquired title to the real property by bargain and sale deed.[23]

Of note, none of the defendants ever agreed to undertake any remedial work at the service station.[24] Local Wrench subsequently went out of business, and its owner left the country. Meanwhile, DEC hired contractors to investigate and remediate contamination at the site. DEC paid the contractors from the Environmental Protection and Oil Spill Compensation Fund, disbursing the money on various occasions from April 1987 to September 1996. In September 1996, the State commenced the lawsuit to recover its remediation costs.

Presented with these facts, the Court of Appeals held Speonk liable as a discharger: "We consider it sufficient for purposes of liability here that, with knowledge of its vendor's discharge of oil and the need for clean up, Speonk did nothing."[25] The Court relies on its 2002 decision in *State v. Green*[26] for the principle that discharger liability is predicated "on a potentially responsible party's *capacity* to take action to prevent an oil spill *or to clean up contamination resulting from a spill*."[27]

The new rule appears to be that a purchaser of contaminated property will be considered a "discharger" where the contamination was known at the time of purchase and the purchaser had the capacity to remediate the spill. As noted by Justice Smith, in dissent, the result of *Speonk Fuel* is that an entity which had no interest in or control over either the real property or the petroleum storage system at the time the discharge occurred is now deemed a "person who has discharged petroleum" under the Navigation Law.[28]

At first blush, *Speonk Fuel* appears to fashion a broad expansion of the law of discharger liability. However, a careful review of the facts underlying *Speonk Fuel* creates considerable questions about the breadth of its holding, and reveals critical information not provided in the Court of Appeals opinion.

The Complete History of the *Speonk Fuel* Decision

As with many cases, *Speonk Fuel* spent years winding its way through the state court system. Commenced in September 1996, the case first reached the Appellate

Division, Third Department in June 2000.[29] The facts reported in that opinion indicate that Defendant Mendenhall purchased the underlying property, and that Defendant Speonk Fuel purchased "the service station business."[30] The Third Department noted that Mendenhall signed a contract to purchase the property in January 1986, shortly before the faulty underground storage tank was removed. Plaintiff commenced suit in September 1996 against Speonk Fuel and Local Wrench only—Mendenhall was not initially a named defendant.[31] Speonk Fuel and Local Wrench initially defaulted, but plaintiff agreed to vacate the default judgment. Speonk Fuel answered, while Local Wrench remained in default. Plaintiff subsequently moved to add Mendenhall as a party defendant, and Speonk Fuel cross moved for summary judgment dismissing the complaint against it.[32]

In its June 2000 opinion, the Third Department addressed the respective appeals of Speonk Fuel (which was denied summary judgment by the lower court) and Mendenhall (who was added as a party defendant pursuant to plaintiff's motion). The Third Department noted that the case was one for indemnification under the Navigation Law.[33] It then set forth its view of the prevailing law of discharger liability:

> This court has consistently construed Navigation Law § 181(1) so as to impose liability on the owner of a system from which a discharge occurred in the absence of evidence that the owner caused or contributed to the discharge. In most cases, the property owner and system owner are one and the same, but where there is no such unity of ownership, liability without regard to fault is properly imposed on the system owner and not on the faultless property owner.[34]

The Third Department held that joinder of Mr. Mendenhall was proper on the grounds that (a) he owned the real property that included the system from which the discharge occurred, and (b) the contamination from that discharge remained when he purchased the system.[35] However, the Third Department *granted* Speonk Fuel's motion for summary judgment, holding that Speonk Fuel's mere operation of the service station business after the system was repaired was insufficient to impose liability.[36]

In other words, in June 2000, Speonk Fuel was out of the case, and it appeared likely that Mendenhall would be held responsible for the cost of the cleanup. None of this factual background appears in the Court of Appeals opinion. The resulting question is obvious: how could the Court of Appeals hold Speonk Fuel liable for the discharge under these facts?

The answer is that the parties *changed* the facts before the case reached the Court of Appeals. In August 2000, the parties stipulated that Mendenhall owned the real property, and that Speonk Fuel owned the underground petroleum storage system.[37] In June 2001, the parties—and the Court—entered into a second stipulation that dismissed the Complaint against Mendenhall, *reinstated* Speonk Fuel as a defendant, and consented to entry of judgment against Speonk Fuel on the issue of liability under the Navigation Law.[38] Speonk Fuel reserved the right to appeal, and the right to contest the reasonableness of damages.

Plaintiff then moved for summary judgment on the issue of damages, seeking indemnification of actual cleanup and removal expenses.[39] Speonk Fuel opposed the motion, asserting that a triable issue of fact existed regarding the reasonableness of the cleanup costs expended, and that the six year statute of limitations on common law indemnification actions precluded recovery of certain payments made by the State.[40] The Supreme Court granted plaintiff's motion, awarding it judgment for all cleanup costs incurred within six years of the commencement of the action plus prejudgment interest.[41]

When the case returned to the Third Department in July 2003, Speonk Fuel's stipulation of liability made all the difference: "*As a discharger*, Speonk is strictly liable to plaintiff for 'all clean up and removal costs and all direct and indirect damages.'"[42] Unfortunately for Speonk Fuel, the Third Department held that the Navigation Law § 185 provision permitting a hearing to contest the validity or amount of damage or cleanup claims did not apply to situations where the Fund seeks reimbursement from the discharger.[43] The October 2004 Court of Appeals decision followed suit, without mention of the stipulations.

The Full Case History Supports the Dissent

The undisclosed factual background lends additional credence to Judge Smith's dissent. Judge Smith singles out the majority's reliance upon *State v. Green*. As noted above, *Green* involved liability placed on a trailer park owner for contamination caused by his tenant.[44] The majority cited *Green* for the proposition that liability is predicated on the potentially responsible party's "capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill."[45] However, the *Green* court took care to condition liability on the ability of the trailer park owner to *control* potential sources of contamination on its property, and held that the term "discharger" would include landowners who have *both* control over activities occurring on their

property *and* reason to believe that petroleum products will be used by tenants.[46]

In contrast, the full case background in *Speonk Fuel* reveals that while Speonk Fuel had knowledge that petroleum products were in use at the property, it did not own the system (or the land) at the time of the discharge and did not actually control the premises until nearly two months *after* the defective tank was removed. In essence, the Court disregarded *Green*'s control test in favor of a new standard: mere failure to remediate.

As a result, Speonk Fuel became a "person who has discharged petroleum" despite both (a) the absence of any discharging activity and (b) the absence of a discharging system at the property. Judge Smith's dissent correctly points out that the Court is imposing liability on Speonk Fuel despite the fact that it had "nothing whatsoever to do with causing petroleum to be discharged."[47]

"[T]he full case background in Speonk Fuel *reveals that while Speonk Fuel had knowledge that petroleum products were in use at the property, it did not own the system (or the land) at the time of the discharge and did not actually control the premises until nearly two months after the defective tank was removed."*

Conclusion

In the end, *Speonk Fuel* creates difficulty for those attempting to forecast discharger liability. *Speonk Fuel* instructs that liability may now be predicated on nothing more than an ability to clean up pre-existing contamination, without regard to whether the "discharge" is ongoing or was actually caused by the purported discharger. This expansive view of discharger liability goes well beyond the *Green* control test, and adopts a standard in line with the "immediate cleanup" goal articulated by the Third Department in *State v. Montayne*.[48] Yet the actual facts of the case suggest that discharger liability was imposed based on nothing more than a convenient legal fiction: by stipulation, Speonk Fuel *consented* to discharger liability status, regardless of whether it actually qualified as a "discharger" under prevailing law. For this reason alone, *Speonk Fuel* should be limited to its unique facts, or at the very least applied on a case-by-case basis.

Unfortunately, the full extent of *Speonk Fuel* will not be known until it is applied by the lower courts.[49] Until then, potential purchasers of real property (and their attorneys) must exercise great care in deciding whether to purchase a contaminated parcel.

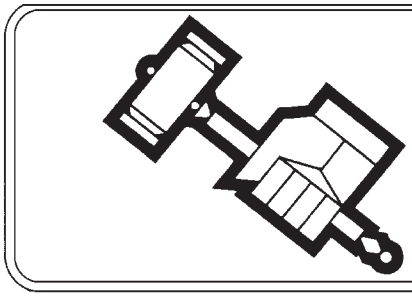
Endnotes

1. *State of New York v. Speonk Fuel Inc.*, 3 N.Y.3d 720 (2004). The Court subsequently denied a motion for leave to reargue. *See State of New York v. Speonk Fuel, Inc.*, 4 N.Y.3d 740 (2004).
2. *See generally* Navigation Law §§ 170-197.
3. Navigation Law § 172(8).
4. Navigation Law § 181(1).
5. *See generally White v. Long*, 85 N.Y.2d 564, 568 (1995); *State of New York v. Markowitz*, 273 A.D.2d 637, 640 (3d Dept. 2000).
6. 85 N.Y.2d at 568 (citing *White v. Regan*, 171 A.D.2d 197, 199-200 (3d Dept. 1991)).
7. 85 N.Y.2d at 568.
8. 93 N.Y.2d 830 (1999). The court held that dismissal of the plaintiff's Article 78 petition to lift a lien imposed under Navigation Law § 181(1) was proper given the presence of another adequate remedy at law—namely, the provisions of the New York State Lien Law.
9. *Berens v. Cook*, 263 A.D.2d 521, 522 (2d Dept. 1999); *Hjerpe v. Globerman*, 280 A.D.2d 646 (2d Dept. 2001).
10. *White v. Regan*, 171 A.D.2d 197 (3d Dept. 1991); *Popolizio v. City of Schenectady*, 209 A.D.2d 670 (3d Dept. 2000) (imposing discharger liability on owner of property at time of discovery of the leak); *but see Whitesell v. Walchli,* 237 A.D.2d 959 (4th Dept. 1997) (holding that discharger liability "is based upon conduct, not status . . . and nothing in the statute could be construed as making a landowner responsible solely because it is a landowner.").
11. *See generally 310 South Broadway v. McCall*, 275 A.D.2d 549 (3d Dept. 2000).
12. *State v. Montayne*, 199 A.D.2d 674 (3d Dept. 1993); *see also State v. Avery-Hall Corp.*, 279 A.D.2d 199 (3d Dept. 2001) (citing *Montayne*).
13. 96 N.Y.2d 403.
14. *Id*. at 405.
15. *Id*. at 406-07.
16. *Id*. at 407.
17. *Id*. at 407-08.
18. *See State v. Robin Operating Corp.*, 3 A.D.3d 767 (3d Dept. 2004); *Roosa v. Campbell*, 291 A.D.2d 901 (4th Dept. 2002).
19. 3 N.Y.3d at 722.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*. However, the Court notes that the attorneys for Mendenhall and Local Wrench discussed remedial work and potential insurance coverage with unnamed state representatives at some point after the closing. *Id*. at 722.
25. 3 N.Y.3d at 724.
26. *State of New York v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2002).
27. 3 N.Y.3d at 720; *see also Green*, 96 N.Y.2d at 407. Note, however, that *Green* does not expressly discuss the "capacity" of the

defendant to provide for clean-up, instead holding that the defendant's "failure, unintentional or otherwise, to take any action in controlling the events that led to the spill or to effect an immediate cleanup renders it liable as a discharger." *Id*.

28. 3 N.Y.3d at 725 (Smith, J., dissenting).
29. *State of New York v. Speonk Fuel, Inc*., 273 A.D.2d 681 (3d Dept. 2000).
30. *Id*. at 681.
31. *Id*.
32. *Id*. at 681.
33. *Id*. at 682.
34. 273 A.D.2d at 682 (internal citations omitted).
35. *Id*. at 682.
36. *Id*.
37. *See* Record on Appeal to Supreme Court, Appellate Division, Third Department, Case No. 92728.
38. *See id*.
39. *State of New York v. Speonk Fuel Inc*., 307 A.D.2d 59 (3d Dept. 2003).
40. *Id*. at 60-61.
41. *Id*. at 61.
42. *Id*. at 63.
43. *Id*. at 63.
44. 96 N.Y.2d at 405.
45. 3 N.Y.3d at 724.
46. 96 N.Y.2d at 407.
47. 3 N.Y.3d at 725.
48. 199 A.D.2d 674.
49. To date, *Speonk Fuel* has been cited only twice. *See State v. Neill*, 17 A.D.3d 802 (3d Dept. 2005); *State v. Dennin*, 17 A.D.2d 744 (3d Dept. 2005). In each case, the Third Department cited *Speonk Fuel* for the proposition that a discharger has no right to contest the reasonableness of site cleanup costs.

Richard L. Weber received his J.D. from the College of William and Mary School of Law in 1999, and his B.A. from SUNY-Buffalo in 1994. He is a litigation associate in the Syracuse office of Bond, Schoeneck & King, PLLC. His practice includes the representation of clients in complex environmental litigation, including personal injury and property damage claims arising from soil and ground water contamination, and claims under the New York Navigation Law arising from petroleum contamination.



Administrative Decisions Update

Prepared by Jeffrey L. Zimring

In re the Application for Mined Land Reclamation Permit for a Mine in the Town of Rochester, County of Ulster, Pursuant to Article 23, Title 27 of the Environmental Conservation Law, and for an Air State Facility Permit Pursuant to Article 19 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 201-5.

-by-

METRO RECYCLING & CRUSHING, INC.

Decision of the Acting Commissioner

April 21, 2005

Metro Recycling & Crushing, Inc. (the "Applicant") applied for a State air permit and a modification and renewal of its existing mined land reclamation law ("MLRL") permit for an existing mine. Administrative Law Judge ("ALJ") Maria E. Villa ruled that two issues were in need of adjudication. The Applicant and New York Department of Environmental Conservation ("DEC") staff appealed. Acting Commissioner Denise Sheehan (the "Acting Commissioner"), however, reversed the ALJ and held that the permit application presented no issues for adjudication.

Background

The Applicant seeks to replace a 150-ton-per-hour crusher operating in its existing mine with a 400-ton-per-hour portable jaw crusher. The proposed MLRL permit modification and new air permit will allow operation of the larger crusher. DEC, as lead agency, determined that the replacement of the crusher, an unlisted action, would not have a significant impact on the environment and issued a negative declaration. Accordingly, DEC staff issued draft permits for the new crusher. In response to a petition by Rochester Residents Association ("RRA"), ALJ Villa ruled that the permit application raises adjudicable issues with respect to traffic and hydrogeology (although resolution of the hydrogeology issue was available if the Applicant accepted a certain permit condition). DEC staff and the Applicant appealed the ALJ's ruling while RRA did not.

The Applicant and DEC staff each challenge the ALJ's ruling regarding traffic and hydrogeology. In its appeal, the Applicant argued that RRA's concerns regarding hydrogeology relate to previously permitted mining operations rather than the proposed modified permit. RRA, the Applicant asserts, failed to make a sufficient offer of proof that the proposed change would result in a change in the mine's extraction rate. The Applicant also contended that RRA failed to demonstrate how the operation of the 400-ton-per-hour crusher would be more dangerous to groundwater sources than the existing crusher, especially in light of a permit condition requiring additional precautions designed to protect groundwater. With respect to the traffic issue, the Applicant maintained that RRA failed to connect the alleged traffic impacts to the proposed modifications.

DEC staff agreed with the Applicant that the traffic issue proposed by RRA arises from the currently permitted activity and would not be affected by the activity described in the current application. Further, DEC staff argues that the ALJ's ruling fails to explain why RRA's proposed hydrogeology issue is not adequately addressed by the conditions included with the draft permit.

Discussion

Traffic

The ALJ ruled that RRA submitted a sufficient offer of proof raised an adjudicable issue with respect to the impact on traffic safety arising from the mine's increased output capacity associated with the proposed crusher upgrade. The Acting Commissioner notes, however, that before the traffic issue raised by RRA will be appropriate for adjudication, RRA must establish that the negative declaration issued by DEC staff was issued irrationally or upon an error of law. The test for determining the rationality of the negative declaration is whether DEC staff took a "hard look" at the potential environmental impacts and made a "reasoned elaboration" of the basis for its determination. RRA's argu-

ments at the issues conference did not support a finding that the DEC staff's negative declaration was irrational.

RRA's traffic assertions were based entirely on an assumption that truck traffic will increase. Therefore, any conclusions drawn about the proposed crusher upgrade's impacts on traffic are merely conclusory and speculative. DEC staff's use of the Applicant's traffic projections, however, was not irrational or otherwise affected by an error of law. Therefore, DEC staff's decision to forgo the requirement for an environmental impact statement should not be disturbed and traffic is not an adjudicable issue.

Although RRA also raised a traffic issue with respect to the MLRL, the ALJ's ruling that traffic is adjudicable was grounded solely on SEQRA reasoning. Because RRA did not appeal the ALJ's ruling, any MLRL traffic issue raised by RRA in its petition is not properly before the Acting Commissioner. Therefore, because the Acting Commissioner found no reason to overturn DEC staff's negative declaration and there was no issue on appeal with respect to MLRL traffic concerns, the ALJ's ruling that traffic is to be adjudicated was reversed.

Hydrogeology

RRA's proposed issue regarding site hydrogeology centered on the potential impacts of a fuel spill on nearby wells. Paul Rubin, RRA's hydrogeologist, argued that the permit modification should be denied because the Applicant would not be able to satisfy the policies and requirements of the ECL and its attendant regulations. Jeff Lang, the Applicant's consultant, and Robert Martin, a DEC Mined Land Reclamation Specialist, countered with proposed testimony that the use of the larger crusher would have no effect on site hydrogeology because of a sand and gravel buffer between the mine floor and the water table. Further, a special condition of the draft permit addresses the potential for fuel spills with specific requirements for storage and equipment fueling operations. The ALJ ruled, however, that the hydrogeology issue was adjudicable unless the Applicant agreed to provide potable water to adjacent landowners in the event of groundwater contamination.

The Acting Commissioner disagreed with RRA and the ALJ regarding the need to adjudicate the hydrogeology issue. DEC staff identified the potential for environmental impact arising from fuel spills and addressed the issue before issuing its negative declaration. Additionally, RRA was not able to offer support for its factual allegations concerning the rapid movement of fuel spills through the subsurface aquifer or that the use of the larger crusher would lead to an increased risk of a fuel spill. Finally, subject to a slight modification to the permit special condition regarding equipment fueling, RRA raised no reasonable doubt that the special condition is not adequately protective of groundwater resources. Specifically, while the permit special condition requires the availability of a fuel-spill kit, the Acting Commissioner predicated her decision on the inclusion of the requirement of actual use of the spill kit in the event of any fuel spill. Therefore, the Acting Commissioner reversed the ALJ with respect to the need to adjudicate the hydrogeology issue.

Conclusion

RRA failed to raise any adjudicable issue with regard to traffic or hydrogeology. The ALJ's ruling, therefore, was reversed and DEC staff were directed to continue processing the Applicant's MLRL permit modification and new air source applications.

* * *

In re the Proposed Field-wide Spacing and Integration Rules for the COUNTY LINE FIELD, Pursuant to Article 23 of the Environmental Conservation Law and Parts 550 through 559 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Interim Decision of the Assistant Commissioner

May 24, 2005

Fortuna Energy, Inc. ("Fortuna"), New York State Department of Environmental Conservation ("DEC") staff and party-status petitioners Buck Mountain Associates ("Buck Mountain") and Western Land Services, Inc. ("WLS") appealed Administrative Law Judge ("ALJ") Susan J. DuBois' Ruling on Issues and Party Status. The ALJ ruled that the location of the western boundary of the western spacing unit of the natural-gas field under consideration should be adjudicated and that no adjudication of the proposed spacing and compulsory integration order is warranted. Assistant Commissioner and Acting Commissioner Denise Sheehan (the "Acting Commissioner"), modified the ALJ's ruling to the extent that no issue other than the boundary of the western spacing unit of the field is appropriate for adjudication.

Background and Proceedings

In 2000, Fairman Drilling Company ("Fairman") and East Resources, Inc. ("East Resources") began development of the County Line natural gas field located in Steuben, Chemung, and Schuyler Counties (the "Field"). Pennsylvania General Energy Corporation ("PGE") began drilling operations. Fortuna subsequent-

ly obtained the interests owned by Fairman, East Resources and PGE and continued to develop the Field.

DEC staff determined that field-wide spacing and integration rules were necessary and entered into a stipulation with Fairman and PGE that contained field-wide spacing rules, procedures for future wells, and provisions for compulsory integration of interests within the gas well spacing units. The proposal contained five spacing units within the Field: the Youmans unit (630.6 acres), the Roy unit (635.9 acres), the Whiteman unit (550.4 acres), the Peterson unit (635.9 acres), and the Purvis unit (498.83 acres). Final determination of the spacing unit boundaries and integration rules is the subject of a permit hearing proceeding conducted pursuant to 6 N.Y.C.R.R. Part 624 ("Part 624").

A joint petition for party status was submitted by landowners Alan T. and Darcie J. Stephens, as owners of two parcels of property located less than 100 feet to the west of the proposed western boundary of the Youmans unit (the "Stephens Tract"), and WLS, the holder of an oil and gas lease for the Stephens Tract. Additionally, Buck Mountain, as the holder of an oil and gas lease for property located approximately 300 to 400 feet to the east of the eastern boundary of the proposed Purvis unit, filed a separate petition for party status. After the Part 624 legislative hearing and issues conference, ALJ DuBois ruled that Buck Mountain had failed to raise an adjudicable issue and, therefore, denied Buck Mountain party status. WLS, however, raised an adjudicable issue with respect to the location of the western boundary of the Youmans unit.

Discussion

Statutory and Regulatory Background

The DEC is required by New York Environmental Conservation Law ("ECL") to regulate the use of the State's natural gas reserves in such a manner as to maximize the use of the resources while preventing waste and protecting the rights of all those affected by the drilling. Once a well operator has developed one or more gas-producing wells in a field, DEC staff must develop and issue an order that will result in the efficient and economic development of the natural gas pool as a whole. The size and the shape of the spacing units for the well field are arrived at through the analysis of test data and other information usually provided by the operator. While guidance for the size and shape of the spacing units is generally provided by the ECL, the DEC may grant a variance from the guidelines provided the owners of each spacing unit receives their "just and equitable share of the production of the [natural gas] pool." After the operator and DEC staff agree to a stipulation describing the parameters of the well field, hearing procedures described by Part 624 are used to refine and finalize the gas well spacing order.

Applicability of Part 624 Procedures and Use of Stipulations

WLS objects to the use of Part 624 procedures, including the "substantive and significant" threshold for determining whether an issue is adjudicable, for the determination of field-wide spacing unit boundaries and integration order. Further, WLS challenged DEC staff's practice of entering into stipulating with well operators. The Acting Commissioner, however, rejected both arguments.

In *re Terry Hill South Field* (Commissioners First Interim Decision, Dec. 21, 2004) (summarized in Administrative Update, *New York Environmental Lawyer*, Winter 2005), addressed both the applicability of Part 624 procedures to spacing-unit and compulsory integration order proceedings as well as the use of stipulations between DEC staff and well operators. In that decision, Commissioner Erin Crotty specifically determined that Part 624 procedure adequately protects the right to a hearing guaranteed to all applicants and petitioners.[1] Moreover, the use of stipulations between DEC staff and well operators is not improper because the issues addressed in such stipulations may be challenged to the same extent that those covered by draft permits in other contexts. Therefore, the Acting Commissioner rejected the challenges by WLS citing the reasoning applied by Commissioner Crotty in *Terry Hill*.

Adequacy of Public Hearing Notice

Buck Mountain argued that the combined notice of public hearing and negative declaration for this proceeding was inadequate because it failed to receive sufficient notice of the scope of the proceeding, the administrative process, or subsequent changes that might affect rights in the Field. The Acting Commissioner notes, though, that Buck Mountain received actual notice of the proceeding, filed a petition for party status, appeared and had full opportunity to be heard. Moreover, Buck Mountain did not identify any legal requirement that the notice failed to satisfy. Because the notice gave sufficient detail to provide all potential parties with reasonable notice of the proceedings, the Acting Commissioner rejected Buck Mountain's argument that the notice was deficient.

Spacing Unit Configuration

1. Purvis Unit

Buck Mountain maintained that an adjudicable issue exists concerning the configuration of the Purvis unit. Specifically, Buck Mountain argued that spacing units are required to be of uniform size and configuration and that DEC failed to provide a reason for the

departure from that requirement or for allowing the Purvis and Peterson units to be of different sizes and configurations. Furthermore, Buck Mountain maintains that if the size of the Purvis unit is changed, even slightly, then the property on which it has an oil and gas lease would be included in the Field.

Merely alleging that the proposed spacing units are not of uniform size and that the wells are not centrally located in each unit is not sufficient to raise an adjudicable issue. The Acting Commissioner notes that the applicable standard applied to the configuration only requires that the spacing units be "approximately uniform" and that where "circumstances reasonably require," variances may be allowed. Moreover, referring to the seismic and other information contained in the record, the boundaries of the Purvis unit were placed appropriately with respect to the natural boundaries of the subsurface gas-bearing feature. Accordingly, no issue appropriate for adjudication regarding the Purvis unit exits.

2. Youmans Unit

Both Fortuna and DEC staff challenged the ALJ's determination that an adjudicable issue exists with regard to the western boundary of the Youmans unit. The issue is whether the Stephens Tract should be included in the Youmans unit or, if not, should an expansion unit be created to the west of the Youmans unit. WLS's expert offered proposed testimony to support WLS's assertion that the well in the Youmans unit will drain an area to the west of the well that is larger than the area to the east of the well. Furthermore, the expert opined that the gas-bearing feature of the unit extended further to the west than the proposed boundary and included an area under the Stephens tract.

Fortuna and DEC staff were unable to counter the arguments put forth by WLS. Although DEC staff concluded that the boundary location is proper, it put forth no explanation as to how the conclusion was reached. Fortuna merely raised factual and credibility issues regarding WLS's offer of proof. Such issues are not appropriate for resolution at the issues conference stage of the proceeding. Moreover, although DEC staff and Fortuna note that the stipulation allows for future development of extension units, they do not explain, though, how the rights of land owners to the west of the Youmans unit are protected if the Youmans unit drains those lands. The Acting Commissioner, therefore, agreed with the ALJ that WLS raised a significant and substantive issue regarding the western boundary of the Youmans unit.

The Acting Commissioner disagreed with the ALJ, however, regarding the need for an expansion unit. Nothing in WLS's offer of proof indicated that any additional well was proposed west of the Youmans unit or that the criteria for the establishment of an expansion unit had been met.

Compulsory Integration

Buck Mountain argued that the compulsory integration order is inconsistent with prior compulsory integration orders. However, because Buck Mountain was not able to raise an adjudicable issue with respect to the configuration of the Field, it has no interest in the Field. Moreover, Buck Mountain failed to show how any future permit or expansion unit that might include its interests is adversely affected by the proposed integration order. Therefore, Buck Mountain has failed to raise any adjudicable issue regarding the compulsory integration order.

WLS's remaining issues on appeal depend on the resolution of the issues raised for adjudication by WLS. They are, therefore, neither ripe nor appropriate for consideration on appeal. DEC staff asked for an order fixing the boundaries of all units except the Youmans unit and integrating those units. WLS presented no evidence that changes to the western boundary of the Youmans unit will affect the other units. The Acting Commissioner, therefore, granted DEC staff's request and issued an interim order establishing the configuration of the remaining units and integrating the interests in those units.

Conclusion

Buck Mountain was unable to raise an adjudicable issue and, therefore, the ALJ's ruling denying party status is affirmed. The ruling that raised an adjudicable issue is modified to the extent that the only issue to be adjudicated is the location of the western boundary of the Youmans unit. All other issues proposed by WLS are denied or reserved pending resolution of the Youmans unit boundary issue. Fortuna asserted that much of the information needed during adjudication is confidential. The Acting Commissioner stated that in the event confidential information is needed, the ALJ shall take appropriate steps to maintain the confidentiality of that information. Finally, the Acting Commissioner directed DEC staff to prepare an interim order establishing the boundaries of the Roy, Whiteman, Peterson and Purvis units and integrating the interests with those units.

Endnote

1. In *Terry Hill*, the Commissioner analogized the "substantive and significant" standard to the standard applicable to a summary judgment motion within a judicial proceeding.

Jeffrey L. Zimring is an associate with Whiteman Osterman & Hanna LLP in Albany, New York.

Recent Decisions in Environmental Law

Student Editor: James Denniston

Prepared by students from the Environmental Law Society of St. John's University School of Law

Smith v. Town of Mendon, 4 N.Y.3d 1, 2004 WL 2941271 (N.Y.).

Facts

Appellants Paul and Janet Smith own a 9.7 acre lot in the Town of Mendon, New York. Several portions of the lot lie within environmentally sensitive areas classified as environmental protection overlay districts ("EPODs") pursuant to the Town Code.[1] Four separate EPODs limit the Appellants' use of their property.[2] The Appellants applied to the Town Planning Board for site plan approval to construct a single-family home on the non-EPOD portion of the lot. The Board issued a final site plan approval upon condition that the Appellants file a conservation restriction on any development within the mapped EPOD areas. The restriction sought by the Town would not only nearly parallel the limitations already set by the EPOD regulations, but, unlike the EPOD regulations, would also run with the land in perpetuity, and afford the Town greater enforcement power.

Appellants rejected the proposed conservation restriction as an unconstitutional taking and commenced a hybrid declaratory judgment/article 78 proceeding.[3] The Supreme Court, Monroe County, concluded that although the conservation restriction was an "exaction," it did not constitute an unconstitutional taking. The Appellate Division, Fourth Department, determined that the lower court erred in its "exaction" characterization of the restriction, but held that, because the proposed conservation restriction bore a reasonable relationship to the Town's objective of preserving the environmentally sensitive EPODs, there was no taking entitling the Appellants to compensation.

Issue

The issue, addressed by the Court of Appeals in this decision, of whether a municipality commits an unconstitutional taking when it conditions site plan approval on the landowner's acceptance of a development restriction consistent with the municipality's pre-existing conservation policy, rested on two considerations. The first was whether the conservation restriction constituted an "exaction." The second and dependent consideration was which level of scrutiny applied in the determination of an unconstitutional taking.

Reasoning

Citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[4] the Court defines an "exaction" as "land-use decisions conditioning approval of development on the *dedication of property to public use*" [emphasis added]. Conditioning of this kind, according the Court of Appeals, has been held to be unconstitutional and is found in a "narrow, readily distinguishable class of cases." The Court thereby cites *Nollan v. California Coastal Comm'n*[5] and *Dolan v. City of Tigard*[6] as examples. Both *Nollan* and *Dolan* involved some sort of public use dedication such as a public access easement over beachfront property, land for a public storm drainage system, and a publicly accessible pedestrian/bicycle path. According to *Dolan*, an "exaction" of this kind requires not only an "essential nexus" between the condition and the purpose of the land use restriction, but also a "rough proportionality" between the condition and the impact of the proposed development.

The Court reasoned that none of the above applied to the case at hand. The "do-no-harm" conservation restriction required by the Town of Mendon for site plan approval does not involve the type of property dedication found in *Nollan* or *Dolan* and does not deserve the closer scrutiny necessary for such a condition. The Court declined to extend the concept of exaction where there is no dedication of property to public use and the restriction merely places conditions on development.

Having held the Town of Mendon's development condition does not constitute an "exaction," the Court then reviewed it according to the standard articulated by the U.S. Supreme Court in *Agins v. City of Tiburon*[7] and *Penn Central Transp. Co. v. New York City.*[8] In sum,

the standard for when a governmental regulation becomes a taking requires that the regulation deprive the landowner of "all economically viable use."[9] And should the contested regulation fall short of eliminating all economically viable uses of the encumbered property, then the Court examines several factors to determine the existence of a taking: "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[10] The character of the government action is further required to "substantially advance legitimate state interests."[11] The regulatory action then need only be reasonably related to a legitimate government purpose.[12]

Applying this reasoning, the Court concluded that conservation restriction did not effect an unconstitutional taking in two ways. First, the restriction neither denies the Appellants economically viable use of the property, nor does it appreciably diminish the value of their property. A single dwelling on a protected, ten-acre parcel is a valuable, marketable asset, according to the Court. Further, the pre-existing and unchallenged EPOD restrictions had already diminished the developmental value of the property. Second, the conservation restriction substantially advances the legitimate government purpose of environmental conservation. It protects sensitive areas in perpetuity, places subsequent owners on notice of the developmental limitations, and allows the Town a more effective means of ensuring compliance—allowing for injunctive relief and entrance to the property to interdict harmful activities within the EPODs upon 30 days' notice. Under the EPOD regime, the Town of Mendon could only issue citations for violations.[13]

Conclusion

According the Court, there was no "exaction" arising from this conservation restriction and therefore no unconstitutional taking occurred in the absence of an appreciable loss in property value and an advancement of a legitimate government purpose. Affirming the order of the Appellate Division, the Court held that " a modest environmental advancement at a negligible cost to the landowner does not amount to a regulatory taking" and that the Appellant's other claims were "without merit."

Brian P. Mitchell, '07

Endnotes

1. Specifically, § 200-23 of the Mendon Town Code.
2. The four EPODs protected: "Steep Slope" areas, sensitive lands bordering a major creek, established wooded areas, and flood plain areas. All four contain comprehensive use limits such as barring the construction of new buildings or structures, barring the clearing of land areas, etc.
3. The Appellants sought a judgment declaring that the conservation restriction was, as a matter of law, a conservation easement under ECL § 49-0303(1) as well as that the Board's decision to condition site plan approval was arbitrary and capricious, entitling appellants to costs pursuant to Town Law § 282.
4. 526 U.S. 687, 702 (1999).
5. 483 U.S. 825 (1987).
6. 512 U.S. 374 (1994).
7. 447 U.S. 255 (1980).
8. 438 U.S. 104 (1978).
9. *City of Monterey*, 526 U.S. at 720; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).
10. *Palazzolo*, 533 U.S. at 617.
11. *Agins*, 447 U.S. at 260.
12. *Bonnie Briar Syndicate Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 108 (1999); *see also City of Monterey*, 526 U.S. at 702, 721; *Hotel & Motel Ass'n v. City of Oakland*, 344 F.3d 959, 968 (9th Circuit 2003).
13. All the while, under both the EPOD regulations and the conservation restrictions, the Appellants could seek permission from the Town to engage in proscribed activity in the protected areas.

* * *

State of New York, Respondent-Appellant v. Speonk Fuel, Inc., Appellant-Respondent, et al., Defendants, 786 N.Y.S.2d 375 (2004).

Facts

After its failure to pass a tightness test, a 4,000-gallon unleaded gasoline tank was removed from an underground petroleum storage system operated by a gasoline service station located in East Quogue, N.Y. It was later found that the tank had a hole of approximately one eighth of an inch in diameter. Having determined that it was not possible to clean up all the oil-contaminated soil resulting from past leakage, on January 14, 1986 the New York State Department of Environmental Conservation (DEC) advised the service station owner to install groundwater monitoring wells. The DEC warned that failure to investigate and remedy the groundwater contamination would result in DEC undertaking the necessary work and seeking reimbursement and penalties from the owner pursuant to article 12 of the Navigation Law, commonly called the Oil Spill Act.

At the same time as these events were unfolding, the owner of the service station, Local Wrench Service Station, Inc., was negotiating to sell the property to Speonk Fuel, Inc. On March 12, 1986, roughly seven weeks after removal of the defective tank, Speonk acquired title to the property. Speonk's president, Thomas

Mendenhall, was present on the day of the tank tightness testing. Moreover, Mendenhall acknowledged that after the closings on March 12, 1986, his attorney and the attorney for Local Wrench discussed remedial work and potential insurance coverage with respect to the oil spill with State representatives. Neither Speonk nor Local Wrench ever agreed to undertake the remedial work. Consequently, the DEC engaged in the cleanup process to remove the oil spill. The Environmental Protection and Oil Spill Compensation Fund (Fund), which was established under article 12 of the Act, disbursed moneys for the cleanup from April 27, 1987 through September 30, 1996. The State later commenced a cost recovery action pursuant to the Oil Spill Act against Local Wrench and Speonk. Local Wrench had gone out of business and its owner subsequently left the business.

On the issue of liability, the Appellate Division concluded that the successor owner, Speonk, was liable when contamination remained after purchase.[1] On the issue of damages, the court subsequently decided: first, that the State's claim under article 12 accrued and the six-year limitation period began to run each time the Fund made a payment; and second, that the discharger was not permitted to challenge the reasonableness of the Fund's expenditures.[2] The Court of Appeals granted Speonk and the State leave to appeal the Appellate Division's decision on the issue of damages.

Issue

On appeal, the first issue is whether the court should formulate a "variant accrual date" for purposes of determining the period that was within the six-year limitations. And the second issue is whether Speonk should be granted the right to contest the reasonableness of the costs incurred by the Fund. In considering these issues, the Court of Appeals deemed it necessary to review the Appellate Division's decision on liability as well.

Reasoning

In analyzing liability, the Court first contemplated the two purposes for the legislative enactment of the Oil Spill Act: (a) to prevent the unregulated discharge of petroleum, and (b) to accomplish speedy and effective cleanups when spills occur.[3] And second, the Court set forth the applicable standard of liability based on Navigation Law § 181(1), which provides that "any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." Although the category of persons who are held strictly liable is unspecified in the Act, the court followed *State of New York v. Green*[4] in devising a basis for resolving responsibility as a discharger in light of the unique facts and circumstances of a particular spill. Navigation Law § 172(8) defines the word "discharge" as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping" of petroleum into the state's waters. The court in *Green* stated that §§ 181(1) and 172(8) should be read together and construed in a way consistent with the purposes of the Act. Therefore, in cases such as the one at bar, liability is predicated on a potentially responsible party's capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill. While the Court declined to specify any particular action that Speonk might have undertaken, it considered it sufficient for purposes of liability that, with knowledge of its vendor's discharge of oil and the need for cleanup, Speonk did nothing.

On the issue of the time of accrual of the State's indemnification claim, in which the Fund made multiple payments for the cleanup and removal of oil over a period of nine years, the Court refused to formulate a variant accrual date based on either the disbursement of the first payment (as suggested by Speonk) or based on disbursement of the last payment (as suggested by the State). Instead, the Court followed its decision in *State of New York v. Stewart's Ice Cream Co.*[5] and adhered to the "traditional view." Based on this view, a new, separate cause of action accrued each time the Fund made a payment, and the six-year's limitation period started to accrue after each payment.

Finally, on the issue of whether Speonk should be permitted to challenge the reasonableness of the Fund's expenditure, the Court emphasized that § 181(1) of the Act makes the discharger strictly liable for all cleanup and removal costs, and that nowhere in the Act is a discharger afforded any right to contest the reasonableness of the costs incurred by the Fund in an action for indemnification. Nonetheless, the Court noted that a discharger is vested of whatever rights it may have under article 78 of the CPLR to challenge the State's actions with respect to cleanup and removal as being arbitrary and capricious or an abuse of discretion.

Conclusion

Speonk was held strictly liable for the cleanup of the oil spill because: (a) defendant was on notice of the spill before it acquired title to the property, and (b) defendant was potentially responsible and in the capacity to take action but failed to do so. As to the issue of damages, this Court affirmed the Appellate Division's holding that the "traditional view" should be adhered to when calculating the accrual period for the Fund's indemnification claim. This Court also affirmed Appel-

late Division's holding that Speonk is not afforded any right to contest the reasonableness of the costs incurred by the Fund under the Oil Spill Act.

Dissent

Arguments were made that Speonk was not a "discharger" under the meaning of Navigation Law § 181(1) because: (a) it did not cause the petroleum to be discharged, and (b) it had no interest in or control over the real property or the storage system at the time the discharge took place.

Sui Y. Jim, '07

Endnotes

1. *State of New York v. Speonk Fuel, Inc.*, 710 N.Y.S.2d 652 (3d Dept. 2000).
2. *State of New York v. Speonk Fuel, Inc.*, 762 N.Y.S.2d 674 (3d Dept. 2003).
3. Navigation Law § 171.
4. 729 N.Y.S.2d 420 (2001).
5. 484 N.Y.S.2d 810 (1984).

* * *

PRIVATE CAUSES OF ACTION UNDER THE CLEAN AIR ACT—citizens can file suits for nuisance, but may not file private suits alleging violations of consent decrees issued during administrative proceedings for violations of the CAA.

Richard and Thomas Ellis, and Laverne Brashear, Plaintiffs-Appellants/Cross-Appellees v. Gallatin Steel Co. and HARSCO Corp., Defendants-Appellees/Cross-Appellants, 390 F.3d 461; 2004 U.S. App. LEXIS 22252; 65 Fed. R. Evid. Serv. (Callaghan) 773; 59 ERC (BNA) 1400; 34 ELR 20125.

In April 1995, Gallatin Steel and Harsco Co. began operating a steel manufacturing facility and a slag processing plant, respectively, in an industrially zoned area located in Gallatin County, Kentucky, a quarter-mile down U.S. 42 to the west of the plaintiffs. That same month, the Ellises began to notice an unfamiliar dust on their farm, which they attributed to Gallatin's and Harsco's operations. With the arrival of the dust, both plaintiffs experienced respiratory problems, headaches, itchy throats and infections.

The federal Clean Air Act requires each state to establish a state implementation plan to limit emissions in accordance with national ambient air quality standards set by the federal EPA.[1] In compliance with this requirement, Kentucky's SIP prohibits "the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate."[2] To supplement these enforcement provisions, the Clean Air Act allows citizens to file actions to enforce its provisions when they meet two requirements. First, citizens cannot commence their own suits unless they have given 60-days' notice to the Administrator of the EPA, to the state, and to the alleged violator.[3] Second, citizens cannot commence independent suits if the EPA or the state has already commenced an enforcement action and is diligently prosecuting the violation, though they may intervene in these actions.[4]

The Ellises sent a notification letter in compliance with the statutes. Less than 60 days later, the U.S. filed its first enforcement action in the District Court for the Eastern District of Kentucky, charging violations of the Clean Air Act. After the U.S. filed its suit, both the Ellises and Brashear filed citizen lawsuits against Gallatin and Harsco under federal environmental protection laws and state-law nuisance claims. The district court granted the plaintiff's motion to intervene in the U.S.'s enforcement suit.

On June 20, 2002, the district court granted the U.S.'s motion to enter consent decrees. These decrees included various compliance measures; Gallatin and Harsco also agreed to pay civil penalties. The district court concluded that the consent decrees operated as a *res judicata* bar to the private fugitive-dust claims predating their entry, and barred citizen claims regarding all past and continuing violations up to the date of the decree. Given this, the district court ruled in favor of summary judgment against the plaintiff's then existing private suits.

Subsequent to the issuance of the decrees, the plaintiffs re-filed suits alleging violations of the decrees, seeking injunctions and money damages. The court held that the plaintiffs had no right to enforce the consent decrees against defendants. The court held, however, that the fugitive-dust violations constituted a common-law nuisance under state law. The court awarded each plaintiff compensatory damages and a lump sum of punitive damages to the plaintiffs collectively. The court also granted the plaintiffs a permanent injunction and assigned a court-appointed expert to monitor Harsco's and Gallatin's compliance with the injunction.

The Court of Appeals for the Sixth Circuit upheld the district court's findings regarding the state-law nuisance claims flowing from the post-consent decree violations, and the money damages and injunctions granted therefrom. Plaintiffs argued on appeal that *res judicata* did not apply to the Clean Air Act cause of action because the government had not "diligently

prosecuted" the actions, and that they had the right to file suit for violations committed subsequent to the issuance of the consent decrees.

The court stated that it "is well to remember that the *Clean Air Act* primarily serves public, not private, interests. Citizens acting as 'private attorneys general' to enforce the *Clean Air Act*, seek relief not on their own behalf but on behalf of society as a whole, and accordingly 'personalized' remedies are not a first priority of the Act."[5] "The Ellises could have petitioned the EPA to enforce the consent decrees. They could have petitioned the EPA or the court to obtain a modification of the consent decree, and they could have filed a new lawsuit after supplying the requisite notice to the EPA, to Kentucky and to Harsco and Gallatin."

Regarding plaintiffs' "diligently prosecuted" argument, the court stated, "in view of the mere three months that elapsed between the entry of the consent decrees and the district court's injunction . . . it can hardly be said that the Government in this instance was unwilling or unable to enforce the decree."[6] The court found that none of the "cases argued by the plaintiffs established that a court may issue a citizen-suit injunction when consent decrees concluded by the Government grant prospective injunctive relief covering the same ground, much less allow such claims before the decrees have been allowed to work."[7]

Gerard Hanshe, '06

Endnotes

1. 42 U.S.C. §§ 7409(b)(1), 7410(a)(1).
2. 401 Ky. Admin. Regs. 63:010, § 3(2).
3. 42 U.S.C. § 7604(b)(1)(A).
4. 42 U.S.C. § 7604(b)(1)(B).
5. *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 at 477.
6. *Id.* at 478.
7. *Id.* at 478.

(Continued from page 2)

discussion regarding mass transit improvements and funding for New York. **Phil Weinberg** and **Bill Fahey**, the Co-Chairs of our Transportation Committee, arranged the event, which was held at 1:00 p.m. at the City Bar.

Committee Leadership Positions. Thank you to all who recently agreed to serve on the Section's Executive Committee as Co-Chairs or At-Large Members! New additions are:

1. Energy Committee—**Jennifer Hairie**, NYSDEC
2. Environmental Justice Committee—**Jean McCarroll**, Carter Ledyard and **Luis Martinez**, NRDC
3. Legislation Committee—**Michael Lesser**, NYSDEC
4. Water Quality Committee—**Michael Altieri**, NYSDEC
5. Task Force on Petroleum Spills—**Gary Bowitch** (June 1 appointment)
6. At-Large Member—**Michael Naughton**, NYSDEC
7. At-Large Member—**Vincent Altieri**, NYSDEC

We look forward to working with you and benefiting from your talents and experiences.

Section Finances. Jim Periconi put in place a number of initiatives during his term as Chair that put the Section on the path to improved financial health. With those measures in place, the Section then solicited sponsorships for the Fall 2004 and 2005 Annual Meetings. **Judy Drabicki**, **Kevin Ryan**, **Miriam Villani** and I phoned our environmental engineering colleagues and were grateful for the generosity of the 20 firms who were willing to donate $500 each to sponsor cocktail receptions, breakfasts and breaks. These efforts resulted in an increase of approximately $15,000 in our account.

The Next Steps. The Section should continue to be actively engaged in discussing and commenting on the policies being developed in New York State regarding **soil vapor intrusion**. I have asked the **Hazardous Waste/Site Remediation** and **Toxic Tort Committees** to take the lead and recommend effective strategies for informing the debate on this significant issue.

The Section also needs committed members to assist **Joan Leary Matthews** in implementing the impressive **Diversity Plan** that was adopted by the Section in 2004. The Plan was prepared by **Joan Leary Matthews** (Committee Chair), **John Greenthal**, **Eileen Millett**, **Michael Lesser** and **James Sevinsky**. If you are not familiar with the Plan, you can review it on the Section's web site (http://www.nysba.org/environmental) where it is posted on the "Committee" sub-page. Contact me if you would like to participate in its implementation.

Lastly, we should reach out to our entire Section membership and ask those who are interested in participating as Chairs and speakers for our various **Continuing Legal Education** programs to register with the Section. The CLE programs are terrific opportunities for members to meet other attorneys interested in environmental law issues, to fulfill the Section's educational mission, and to debate controversial issues. The Section should ask any member interested in chairing or speaking at a Section CLE program to register so that as future programs are being organized, the Chairs of those programs will have a list of interested members from which to pick. I volunteer to work with our next Section Chair, **Miriam Villani**, to complete this task.

Thank You and Good Wishes. I would like to thank **Joel Sachs** for his service this year to the Section Cabinet and **John Hanna** and **Phil Dixon** for their work on our behalf at the House of Delegates. All my good wishes for every success to **Miriam Villani** who took over as Section Chair on June 1. To the other officers, **Walter Mugdan**, **Lou Alexander** and **Joan Leary Matthews**, you have been the best of colleagues. Thank you. And to **Alan Knauf**, our Secretary as of June 1, I hope you enjoy the next five years as much as I have the past five.

My best wishes to all for a very enjoyable summer.

Virginia C. Robbins

it appears to me that this passion often affects the way we practice law, which is why environmental lawyers, perhaps more than other lawyers, typically have a varied career. Many of us have served in the government, have been in (or in, and out of, and then once again back in) private practice, and have taught environmental law—or hope to!

The background of the officers, with whom I look forward to serving over the next year, reflects this varied experience. The government is well represented: **Walter E. Mugdan**, first vice-chair, is with the U.S. Environmental Protection Agency, and second vice-chair **Louis A. Alexander** works for the New York State Department of Environmental Conservation. **Alan J. Knauf**, the Section's secretary this year, practices law in Rochester, and **Joan Leary Matthews**, the treasurer, is a professor at Albany Law School.

The Section's immediate past chair, **Ginny Robbins**, deserves a round of applause and much thanks for her unflagging efforts on behalf of the Section over the last five years. As chair of the Committee on Committees, Ginny spearheaded the Section's effort to reorganize and become current. This past year alone, Ginny has overseen a program on soil vapor intrusion and our Section's submission to the NYSDEC of comments regarding the Department's draft program policy entitled "Evaluating the Potential for Vapor Intrusion at Past, Current and Future Sites." This is a subject of particular interest to me, as a Long Island practitioner, and I look forward to continuing the Section's work on this issue over the next year. Ginny also helped **Lou Alexander**, second vice-chair, facilitate our Section's selection of four minority law students to receive fellowships in environmental law for employment this summer—a terrific introduction to environmental law for those who may become members—and perhaps leaders—of our Section in the future.

See You in September

In a sense, the future begins in September, with the Fall Meeting of our Section, together with the Municipal Law Section, at The Sagamore, located in Bolton Landing on Lake George, in the beautiful Adirondacks!

The program is terrific, with timely and topical subjects that should be of great interest to all of our members. After getting together for dinner on Friday, September 23, we will open the Saturday morning activities with a CLE program entitled "Redevelopment and Economic Development after *Kelo*." *Kelo* refers to the Supreme Court case involving a challenge to the exercise of eminent domain in New London, Connecticut. Professor **Patricia E. Salkin** of Albany Law School, one of the co-chairs of the program, will moderate the panel consisting, at this point, of **Richard O'Rourke**, Esq., Pace Law School Professor and Section member **John R. Nolon**, and St. John's Professor and former Section Chair **Philip Weinberg**, who will discuss the controversial West Side stadium.

Another session will focus on brownfields issues as they affect municipalities. Here, Section treasurer and one of the program co-chairs, **Joan L. Matthews**, will moderate, with **David J. Freeman**, one of the co-chairs of the Section's Hazardous Waste/Site Remediation Committee, on the panel.

DEC representatives **Angus Eaton** and **Barbara Kendall** will be on a panel exploring "Municipal Stormwater Regulation," moderated by **Robert Feller**, one of the Section's CLE Committee co-chairs.

In addition, we will have a session exploring "Current Ethics Issues in Land Use and Environmental Law." The speakers for this session—**Mark Schachner**, Esq., and Section Ethics Committee chair **Marla Rubin**—will simulate a local planning board session.

Another planned simulation, scheduled for our Saturday evening entertainment, will examine a fascinating subject: The redevelopment of the General Motors plant in Tarrytown, which involves acquisition and open space issues. Pace Law School Professor **Nicholas A. Robinson** and Hofstra School of Law Professor **Bill Ginsberg**, both former Section chairs and highly engaging speakers, are on tap for the evening's program.

CLE credits will be available for the sessions. But there will be much more of interest at the meeting—not the least of which may be an environmental field trip or two in the magnificent Adirondack Park. In addition, The Sagamore offers activities on campus, including golf, tennis, and racquetball, and a spa and health club.

Our Fall Meeting at The Sagamore is just the beginning. Over the course of the year, the Section will continue its mission to bring together environmental lawyers to work together to support, promote or initiate desirable environmental law reform and to provide topical and informative CLE programs. I hope you will join us for the meeting at The Sagamore, and I look forward to a productive and enjoyable year for the Section.

Miriam E. Villani

Section Committees and Chairs

The Environmental Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

Adirondacks, Catskills, Forest Preserve and Natural Resource Management Committee
Carl R. Howard (Co-Chair)
290 Broadway
New York, NY 10007
(212) 637-3216
E-Mail:howard.carl@epa.gov

Thomas A. Ulasewicz (Co-Chair)
358 Broadway, Suite 307
Saratoga Springs, NY 12866
(518) 581-9797
E-Mail:phu@global2000.net

Agriculture and Rural Issues Committee
David L. Cook (Co-Chair)
1300 Clinton Square
Rochester, NY 14603
(585) 263-1381
E-mail: dcook@nixonpeabody.com

Peter G. Ruppar (Co-Chair)
1800 Main Place Tower
Buffalo, NY 14202
(716) 855-1111
E-Mail:pruppar@dhyplaw.com

Air Quality Committee
Robert R. Tyson (Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 218-8221
E-Mail:rtyson@bsk.com

Biotechnology and the Environment Committee
David W. Quist (Co-Chair)
P.O. Box 2272
Albany, NY 12220
(518) 473-4632
E-Mail:davidquist@earthlink.net

Vernon G. Rail (Co-Chair)
70 Suffolk Lane
East Islip, NY 11730
(631) 444-0265
E-mail:railx@attglobal.net

Coastal and Wetland Resources Committee
Terresa M. Bakner (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7615
E-Mail:tmb@woh.com

Drayton Grant (Co-Chair)
149 Wurtemburg Road
Rhinebeck, NY 12572
(845) 876-2800
E-Mail:grantlyons@aol.com

Continuing Legal Education Committee
Robert H. Feller (Co-Chair)
111 Washington Avenue
Albany, NY 12210
(518) 533-3222
E-Mail:rfeller@bsk.com

Maureen F. Leary (Co-Chair)
The Capital
Albany, NY 12224
(518) 474-7154
E-Mail:maureen.leary@
oag.state.ny.us

Kimberlee S. Parker (Co-Chair)
111 Washington Avenue
Albany, NY 12210
(518) 462-7421
E-Mail:kparker@bsk.com

James P. Rigano (Co-Chair)
1393 Veterans Memorial Highway
Suite 301S
Hauppauge, NY 11788
(631) 979-3000
E-Mail:jrigano@certilmanbalin.com

Corporate Counsel Committee
George A. Rusk (Chair)
368 Pleasantview Drive
Lancaster, NY 14086
(716) 684-8060
E-Mail:grusk@ene.com

Energy Committee
Kevin M. Bernstein (Co-Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 218-8329
E-Mail:kbernstein@bsk.com

Jennifer L. Hairie (Co-Chair)
625 Broadway, 14th Floor
Albany, NY 12233
(518) 402-9188
E-Mail:jlhairie@gw.dec.state.ny.us

William S. Helmer (Co-Chair)
30 S. Pearl Street, 10th Floor
Albany, NY 12207
(518) 433-6723
E-Mail:helmer.b@nypa.gov

Enforcement and Compliance Committee
George F. Bradlau (Co-Chair)
P.O. Box 541
18 Washington Street, 2nd Floor
Morristown, NJ 07963
(973) 656-1800
E-Mail:gbradlau@
thebradlaugroup.com

Dean S. Sommer (Co-Chair)
Executive Woods
5 Palisades Drive
Albany, NY 12205
(518) 438-9907, x236
E-Mail:dsommer@youngsommer.com

Environmental Business Transactions Committee
Louis A. Evans (Co-Chair)
990 Stewart Avenue
Garden City, NY 11530
(516) 832-7500
E-Mail:levans@nixonpeabody.com

Joshua M. Fine (Co-Chair)
59-17 Junction Boulevard, 19th Floor
Flushing, NY 11373
(718) 595-5650
E-Mail:jfine@dep.nyc.gov

Jeffrey B. Gracer (Co-Chair)
237 Park Avenue
New York, NY 10017
(212) 880-6262
E-Mail:jgracer@torys.com

Environmental Impact Assessment Committee
Mark A. Chertok (Co-Chair)
460 Park Avenue, 10th Floor
New York, NY 10022
(212) 421-2150
E-Mail:mchertok@sprlaw.com

Kevin G. Ryan (Co-Chair)
10 Circle Avenue
Larchmont, NY 10538
(914) 833-8378
E-Mail:kevingryan@cs.com

Environmental Insurance Committee
Gerard P. Cavaluzzi (Co-Chair)
104 Corporate Park Drive
P.O. Box 751
White Plains, NY 10602
(914) 641-2950
E-Mail:gcavaluzzi@pirnie.com

Daniel W. Morrison, III (Co-Chair)
One North Lexington Avenue
White Plains, NY 10601
(914) 287-6177
E-Mail:dwm@bpslaw.com

Environmental Justice Committee
Peter M. Casper (Co-Chair)
200 Southern Boulevard
P.O. Box 189
Albany, NY 12201
(518) 436-3188
E-Mail:peter_casper@thruway.state.ny.us

Luis Guarionex Martinez (Co-Chair)
40 West 20th Street, 11th Floor
New York, NY 10011
(212) 727-4550
E-Mail:lmartinez@nrdc.org

Jean M. McCarroll (Co-Chair)
2 Wall Street
New York, NY 10005
(212) 238-8828
E-Mail:mccarroll@clm.com

***Journal* Committee**
Kevin Anthony Reilly (Chair)
Appellate Division, 1st Dept.
27 Madison Avenue
New York, NY 10010
(212) 340-0404

Global Climate Change Committee
Antonia Levine Bryson (Co-Chair)
475 Park Avenue South, 16th Floor
New York, NY 10016
(212) 483-9120
E-Mail:abryson@worldnet.att.net

J. Kevin Healy (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-1078
E-Mail:jkhealy@bryancave.com

Hazardous Waste/Site Remediation Committee
David J. Freeman (Co-Chair)
75 East 55th Street
New York, NY 10022
(212) 318-6555
E-Mail:davidfreeman@paulhastings.com

Lawrence P. Schnapf (Co-Chair)
55 East 87th Street, Suite 8B
New York, NY 10128
(212) 756-2205
E-Mail:lschnapf@aol.com

Historic Preservation, Parks and Recreation Committee
Jeffrey S. Baker (Co-Chair)
5 Palisades Drive
Albany, NY 12205
(518) 438-9907, x227
E-Mail:jbaker@youngsommer.com

Dorothy M. Miner (Co-Chair)
400 Riverside Drive
New York, NY 10025
(212) 866-4912

International Environmental Law Committee
John French, III (Co-Chair)
33 East 70th Street, Suite 6-E
New York, NY 10021
(212) 585-3123
E-Mail:tudorassoc@aol.com

Daniel Riesel (Co-Chair)
460 Park Avenue, 10th Floor
New York, NY 10022
(212) 421-2150
E-mail:driesel@sprlaw.com

Constantine Sidamon-Eristoff (Co-Chair)
750 Lexington Avenue, 4th Floor
New York, NY 10022
(212) 872-1500
E-Mail:cseristoff@lltlaw.com

Internet Coordinating Committee
Alan J. Knauf (Co-Chair)
2 State Street, Suite 1125
Rochester, NY 14614
(585) 546-8430, x104
E-Mail:aknauf@nyenvlaw.com

Robert S. McLaughlin (Co-Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 218-8179
E-Mail:mclaugr@bsk.com

Land Use Committee
Rosemary Nichols (Co-Chair)
1241 Nineteenth Street
Watervliet, NY 12189
(518) 810-3438
E-Mail:rosemarynicholslaw@nycap.rr.com

Michael D. Zarin (Co-Chair)
81 Main Street, Suite 415
White Plains, NY 10601
(914) 682-7800
E-Mail:mzarin@zarin-steinmetz.net

Legislation Committee
Philip H. Dixon (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7726
E-Mail:pdixon@woh.com

Michael J. Lesser (Co-Chair)
625 Broadway
Albany, NY 12233
(518) 402-9535
E-Mail:mjlesser@gw.dec.state.ny.us

Membership Committee
David R. Everett (Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7600
E-Mail:dre@woh.com

Mining and Oil and Gas Exploration
Dominic R. Cordisco (Chair)
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550
(845) 569-4329
E-Mail:dcordisco@yahoo.com

Pesticides Committee
Telisport W. Putsavage (Chair)
1990 Old Bridge Road, Suite 202
Lake Ridge, VA 22192
(703) 492-0738
E-Mail:putsavage@chemlaw.com

Pollution Prevention Committee
Dominic R. Cordisco (Co-Chair)
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550
(845) 569-4329
E-Mail:dcordisco@yahoo.com

Shannon Martin LaFrance (Co-Chair)
35 Main Street, Suite 541
Poughkeepsie, NY 12601
(845) 473-7766
E-Mail:slafrance@rapportmeyers.com

Public Participation, Intervention and Alternative Dispute Resolution Committee
Jan S. Kublick (Co-Chair)
500 South Salina Street, Suite 816
Syracuse, NY 13202
(315) 424-1105
E-Mail:jsk@mkms.com

Terrence O. McDonald (Co-Chair)
18 Washington Street, 2nd Floor
Morristown, NJ 07963
(973) 656-1800
E-Mail:tmcdonald@thebradlaugroup.com

Solid Waste Committee
John Francis Lyons (Co-Chair)
149 Wurtemburg Road
Rhinebeck, NY 12572
(845) 876-2800
E-Mail:grantlyons@aol.com

Michael G. Sterthous (Co-Chair)
One Commerce Plaza, Suite 1900
Albany, NY 12260
(518) 487-7620
E-Mail:mgs@woh.com

Toxic Torts Committee
Stanley Norman Alpert (Chair)
180 Maiden Lane
New York, NY 10038
(212) 558-5802
E-Mail:salpert@weitzlux.com

Transportation Committee
William C. Fahey (Co-Chair)
3 Gannett Drive, Suite 400
White Plains, NY 10604
(914) 323-7000, x4183
E-Mail:faheyw@wemed.com

Prof. Philip Weinberg (Co-Chair)
8000 Utopia Parkway
Jamaica, NY 11439
(718) 990-6628
E-Mail:weinberp@stjohns.edu

Water Quality Committee
Michael J. Altieri (Co-Chair)
625 Broadway, 14th Floor
Albany, NY 12233
(518) 402-9187
E-Mail:mjaltier@gw.dec.state.ny.us

Robert M. Hallman (Co-Chair)
80 Pine Street
New York, NY 10005
(212) 701-3680
E-Mail:rhallman@cahill.com

George A. Rodenhausen (Co-Chair)
35 Main Street, Suite 541
Poughkeepsie, NY 12601
(845) 473-7766
E-Mail:grodenhausen@rapportmeyers.com

Task Force on Legal Ethics
Roger Raimond (Co-Chair)
1345 Avenue of the Americas
31st Floor
New York, NY 10105
(212) 586-4050
E-Mail:rar@robinsonbrog.com

Marla B. Rubin (Co-Chair)
P.O. Box 71
Mohegan Lake, NY 10547
(914) 736-0541
E-Mail:mbrbold@mindspring.com

Task Force on Petroleum Spills
Gary S. Bowitch (Co-Chair)
744 Broadway
Albany, NY 12207
(518) 434-0327
E-Mail:bowitchlaw@earthlink.net

Christopher J. Dow (Co-Chair)
300 Linden Oaks, Suite 220
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(585) 899-6030
E-Mail:cjd@devorsetzlaw.com

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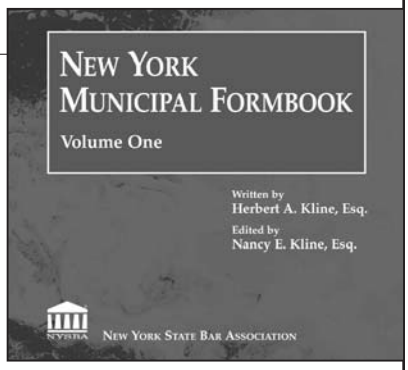

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Pearis, Kline, Barber & Schaewe, LLP
Binghamton, NY

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Binghamton, NY

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Kevin Anthony Reilly

Student Editorial Assistance
St. John's University, School of Law

Editor: James Denniston

Contributors:
Gerard Hanshe
Sui Y. Jim
Brian P. Mitchell

Environmental Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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